THE LOCATION OF HOLOGRAPHIC WILLS*

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North Carolina should abolish its location requirement for making a holographic will. Under the North Carolina holographic wills statute, a handwritten document must be found in an approved location after its author's death in order to be regarded as a holographic will. No other state has mandated a location requirement for holographic wills since 1941.

The location requirement furthers neither of the core functions of will execution formalities: it makes probate courts' decisions less efficient but no more accurate. And, because holographic wills in North Carolina are not technically executed until they are found postmortem, confounding doctrinal issues arise when testators attempt to revoke them before death. The location requirement of the holographic wills statute imposes costs without countervailing benefits.

Thus, the North Carolina General Assembly should abolish the location requirement from the holographic wills statute. In its place, the location in which a decedent stores a purported holographic will should be relegated to simply one contributing factor in assessing testamentary intent. Such a revision would reflect sound policy and bring North Carolina into accord with the rest of the country when it comes to the making of holographic wills.

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INTRODUCTION

Edward Kidder Graham, the eleventh president of the University of North Carolina,[1] died in the influenza pandemic of 1918.[2] The disposition of Graham's estate was reportedly governed by a handwritten note that he prepared in a hotel lobby while he waited to attend the last meeting of the university trustees prior to his death.[3] Although wills typically are formal documents that are executed in the presence of witnesses,[4] a majority of states authorize informal wills, known as holographic wills, which must be handwritten and signed by the testator but need not be witnessed.[5] Therefore, in most states, Graham's handwritten will would have been legally effective simply by his act of signing it.

North Carolina is not like most states, however; at least not with respect to the validity of holographic wills. While all states that authorize

1. *See About the Office*, UNC OFF. CHANCELLOR, https://chancellor.unc.edu/the-office/#chapter-5 [https://perma.cc/TZ7J-EMXB] (last updated 2019).

2. HOWARD E. COVINGTON JR., FIRE AND STONE: THE MAKING OF THE UNIVERSITY OF NORTH CAROLINA UNDER PRESIDENTS EDWARD KIDDER GRAHAM AND HARRY WOODBURN CHASE 174–76 (2018).

3. *See* Patrick Henry Winston, Note, *Holographic Wills in North Carolina*, 2 N.C. L. REV. 106, 106 n.2 (1924).

4. *See* David Horton, *Wills Law on the Ground*, 62 UCLA L. REV. 1094, 1134 (2015) [hereinafter Horton, *Wills Law*] (reporting that only 32 of 332 wills in an empirical study of probate records from Alameda County, California were holographic); *see also* Stephen Clowney, *In Their Own Hand: An Analysis of Holographic Wills and Homemade Willmaking*, 43 REAL PROP. TR. & EST. L.J. 27, 42 (2008) (reporting that only 145 of approximately 10,000 estates in an empirical study of probate records from Allegheny County, Pennsylvania included holographic wills).

5. *See* ROBERT H. SITKOFF & JESSE DUKEMINIER, WILLS, TRUSTS, AND ESTATES 198–99 (10th ed. 2017).

holographic wills require the testator's handwriting and signature, North Carolina is unique in that a holographic will's validity also depends upon the place in which the will is discovered upon the testator's death.[6] This location requirement renders a holographic will invalid unless it is discovered among the testator's valuable papers, at some secure location like a safe-deposit box, or in the possession of someone whom the testator charged with its safekeeping.[7] As such, if Graham's estate truly was distributed according to the terms of a note that he wrote during a brief moment of spare time, then he must have deposited his informal testamentary document in a location that satisfied his home state's unique holographic will statute.

Given that North Carolina stands alone in requiring that valid holographic wills be stored in particular locations, the question becomes whether this idiosyncratic requirement is justified by sound policy considerations. If so, then, unless there is something truly peculiar about North Carolinians, it would seem that the other states that recognize holographic wills should implement similar location requirements. If not, then the North Carolina General Assembly should abolish the location requirement and bring its holographic will statute in line with the majority approach. To address this question, this Article explores the doctrinal development of North Carolina's approach to holographic wills, analyzes the policy foundations of the location requirement, and ultimately concludes that North Carolina should abandon its requirement that holographic wills be stored in prescribed locations.

This Article proceeds in four parts. Part I chronicles the historical evolution of North Carolina's holographic wills statute and explains the doctrinal particularities of the location requirement. Parts II and III explore the policy implications of the location requirement in the context of both creating holographic wills and revoking them. Finally, Part IV proposes that, rather than being a mandatory requirement for the effectiveness of holographic wills, a document's location should be treated as a relevant, but not necessary, consideration when courts evaluate the validity of holographic wills.

I. HOLOGRAPHS AND THE LOCATION REQUIREMENT

All states allow testators to distribute property upon death through formal attested wills.[8] Although the specifics vary from state to state, a

6. *See infra* Section I.B.

7. *See* N.C. GEN. STAT. § 31-3.4(a) (2017).

8. *See* SITKOFF & DUKEMINIER, *supra* note 5, at 142–43 (describing the various sources of will execution statutes amongst the states).

formal attested will must comply with three primary formalities: (1) it must be in writing, (2) it must be signed by the testator, and (3) it must be attested by two witnesses.[9] In addition to the formal attested will, a slim majority of states also authorize a testator to execute an informal holographic will.[10] Like an attested will, a holographic will must be signed and written.[11] However, the requirements for executing a holographic will differ from the requirements for executing a formal attested will in two key respects. First, a holographic will need not be witnessed.[12] Second, while both an attested will and a holographic will must be written, the testator must write a holographic will by hand.[13] If the testator signs a holographic will, it is valid despite the fact that witnesses were not involved in the will execution ceremony.

The general rationale for authorizing informal holographic wills is to make the process of creating a will easier. The execution of a formal attested will can be costly, as it typically involves consultation with an estate-planning attorney.[14] By contrast, holographic wills are designed to simplify the process of creating a will, so that a testator can execute a will without legal assistance.[15] Professor Adam Hirsch nicely summarizes this rationale when he explains:

> Holographic wills . . . ensur[e] that a person's modest financial means do not abridge her legal means of carrying out her estate plan. By providing citizens a simple and straightforward vehicle for estate planning without the assistance of professional counsel, holographic

9. *See id.*

10. *See id.* at 198–99 (identifying twenty-seven states that authorize holographic wills).

11. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 3.2 (AM. LAW INST. 1999).

12. *See id.* § 3.2 cmt. a.

13. There is variation amongst the states that authorize holographic wills regarding the extent to which a holographic will must be handwritten. *See* SITKOFF & DUKEMINIER, *supra* note 5, at 208–10.

14. *See* Daphna Hacker, *Soulless Wills*, 35 LAW & SOC. INQUIRY 957, 979–80 (2010) ("[L]awyers dominate the will-production market, and most testators turn to them for advice in drafting their wills . . . ."); *see also* Alexander A. Boni-Saenz, *Distributive Justice and Donative Intent*, 65 UCLA L. REV. 324, 363 (2018) ("[T]he valid execution and drafting of a will may have more to do with having a legal education or the economic resources to hire a quality attorney than any action or characteristic intrinsic to the person receiving the reward of having her donative intent respected.").

15. *See* Alexander v. Johnston, 171 N.C. 468, 469, 88 S.E. 785, 786 (1916) ("The purpose of the statute is to enable persons who cannot procure the assistance of others in the preparation of a will . . . to execute a valid will by a paper in their own handwriting, and without the formal attestation of witnesses . . . ."); Kevin R. Natale, Note, *A Survey, Analysis, and Evaluation of Holographic Will Statutes*, 17 HOFSTRA L. REV. 159, 160 (1988) ("Legislatures authorize holographic wills as a means of convenience to testators, enabling those who are either unable or unwilling to obtain legal assistance to make a valid will in their own handwriting.").

> wills make dying testate far easier and hence promote the principle of "equal estate planning under law" . . . .[16]

By authorizing testators to distribute property through holographic wills,[17] North Carolina is in the majority of states that recognize streamlining the will execution process as a worthy policy.

Among this majority, however, North Carolina is unique. North Carolina courts do not simply evaluate the validity of holographic wills based upon the familiar requirements that the document be handwritten and signed by the testator. Rather, North Carolina is the sole domestic jurisdiction to require that the document be kept in specified locations in order for it to qualify as a holographic will.[18] Specifically, the North Carolina will execution statute requires that a valid holographic will be

> [f]ound after the testator's death among the testator's valuable papers or effects, or in a safe-deposit box or other safe place where it was deposited by the testator or under the testator's authority, or in the possession or custody of some person with whom, or some firm or corporation with which, it was deposited by the testator or under the testator's authority for safekeeping.[19]

In simplified terms, the location requirement is best understood as identifying three primary locations that suffice to validate a will: (1) among the testator's valuable papers or effects, (2) in a safe-deposit box or other safe place, or (3) in the possession of a third party with whom the instrument was deposited for safekeeping.[20]

16. Adam J. Hirsch, *Inheritance and Inconsistency*, 57 OHIO ST. L.J. 1057, 1074–75 (1996) [hereinafter Hirsch, *Inheritance and Inconsistency*].

17. *See* N.C. GEN. STAT. § 31-3.4(a) (2017).

18. Tennessee previously had a similar location requirement, but it was removed from the holographic will statute in 1941. *See In re* Will of Gilkey, 256 N.C. 415, 420, 124 S.E.2d 155, 158 (1962); *see also* Winston, *supra* note 3, at 107 (noting that North Carolina and Tennessee were the only two states with a location requirement).

19. § 31-3.4(a). One witness must testify regarding the location of the will. *Id.* § 28A-2A-9(2).

20. Some North Carolina courts have listed five permissible locations by separating "valuable papers" from "valuable effects" and "safe-deposit box" from "other safe place." *See, e.g.*, *In re* Will of Church, 121 N.C. App. 506, 508–09, 466 S.E.2d 297, 298 (1996). This is undeniably true—the options are disjunctive and any one is sufficient. *See In re* Will of Allen, 148 N.C. App. 526, 533, 559 S.E.2d 556, 561 (2002) ("[T]he statute should be read in the disjunctive, and, thus, that a will is valid if found either in a safe deposit box, or among testator's valuable papers or among testator's valuable effects, or in a safe place."(citing *In re Will of Church*, 121 N.C. App. at 509; 466 S.E.2d at 298)) . For ease of discussion, this Article will lump them together into three categories.

A. Legislative History

When the North Carolina General Assembly first enacted a will execution statute in April 1784, all wills conveying an interest in land required two witnesses.[21] However, when the legislature reconvened four months later in October, the statute was amended to include a provision authorizing holographic wills.[22] Although the language of the original statute that authorized holographic wills differs from the current statutory language, it nonetheless included a location requirement. In particular, the original statute required valid holographic wills either to be "found amongst the valuable papers or effects of any deceased person" or to "have been lodged in the hands of any person for safe keeping."[23]

The holographic wills statute of 1784 remained unchanged for seventy years until the General Assembly authorized the consolidation and arrangement of the state's general statues into the North Carolina Revised Code of 1854.[24] The only change to the location requirement was the substitution of the word "or" in the phrase "among the valuable papers or effects" for the word "and."[25] Despite this change in the wording of the statute to "'among the valuable papers *and* effects' of the deceased person," the Supreme Court of North Carolina attributed no substantive change to the substituted language.[26]

After this minor antebellum alteration, the statute stood untouched for nearly a century. Then, in 1953, the General Assembly enacted the current holographic wills statute which maintains a location requirement but with an expanded menu of authorized locations.[27] In particular, the revised

21. Act of Apr. 19, 1784, ch. 22, § 11, 1784 N.C. Sess. Laws 351, 354. Prior to 1841, wills conveying interests in personal property did not have to comply with the same formalities as were required for wills that conveyed interests in real property. Act of Jan. 12, 1841, ch. 62, 1840–1841 N.C. Sess. Laws 103.

22. Act of Oct. 22, 1784, ch. 10, § 5, 1784 N.C. Sess. Laws 378, 378–79; *see also In re* Will of Gilkey, 256 N.C. 415, 417–18, 124 S.E.2d 155, 156 (1962) (chronicling the early history of North Carolina's will execution statute).

23. Act of Oct. 22, 1784, § 5, 1784 N.C. Sess. Laws at 378–79.

24. N.C. REV. CODE ch. 119 § 1 (1854).

25. *Id*.

26. *See In re* Jenkins' Will, 157 N.C. 429, 434, 72 S.E. 1072, 1073–74 (1911) (emphasis added) (quoting N.C. REV. CODE. ch. 119 § 1 (1854)) ("We do not think the substitution of the copulative for the disjunctive conjunction was intended to make any substantial change in the law, and the word 'and' should be construed as 'or.'"); Winstead v. Bowman, 68 N.C. 170, 173 (1873) ("We do not think that this substitution was intended to make any change in the meaning of the Act."); Hughes v. Smith, 64 N.C. 493, 495 (1870) ("The change of the conjunction 'or,' in the Revised Statutes, to the conjunction 'and,' in the Revised Code, does not affect the construction of the statute. If the word 'and' is taken in its strict conjunctive sense, the statute would be virtually repealed, or its benefits greatly diminished . . . .").

27. Act of Jan. 7, 1953, ch. 1098, sec. 2, § 31-3, 1953 N.C. Sess. Laws 1024, 1024 (codified as amended at N.C. GEN. STAT. § 31-3.4 (2017)).

statute added "a safe deposit box or other safe place" to the list of acceptable locations, and it also specified that in addition to lodging a holographic will with another person for safekeeping, the testator could deposit her will with a "firm or corporation" for the same purpose.[28] In addition to these larger changes, the 1953 statute reverted the phrase, "among the valuable papers *and* effects," back to "among [the] valuable papers *or* effects."[29] The most recent amendment to the location requirement took place in 2011, when the General Assembly revised the state's statutes for gender neutrality.[30]

B. Doctrinal Development

Although the literal language of the statute focuses on where the instrument was "found" after the testator's death,[31] courts have not interpreted this requirement literally. In this context, the word "found" is not synonymous with "discovered" or "found for the first time."[32] For example, the fact that a relative knows where the instrument is kept before the testator's death does not defeat the requirement that the document be "found" after the testator's death.[33] Rather, the requirement generally refers to where the instrument is located at the time of the testator's death.[34]

Courts have adopted a more flexible interpretation in cases in which the instrument was moved prior to the testator's death without the testator's knowledge. In such cases, courts analyze where the testator kept the instrument *before* it was moved rather than where it was literally located at the time of death.[35] Likewise, if the instrument is unknowingly moved after

28. *Id.*

29. *Id.* (emphases added).

30. *See* Act of June 27, 2011, ch. 31, 2011 N.C. Sess. Laws 1346, 1433.

31. *See* N.C. GEN. STAT. § 31-3.4(a)(3) (2017).

32. *See In re* Will of Wilson, 258 N.C. 310, 312–13, 128 S.E.2d 601, 603 (1962).

33. *Id.* (rejecting the argument that testator's brother could not have "found" the will after her death because he had known for years that she kept it in her desk).

34. North Carolina courts appear to make an exception for holographic wills that are destroyed contemporaneously (or nearly so) with the death of the testator. *See* Hewitt v. Murray, 218 N.C. 569, 570–72, 11 S.E.2d 867, 867–68 (1940). Although such a document may never be "found" after the testator's death, it may nonetheless be probated as a lost will as long as sufficient evidence exists regarding where the document was stored at the time of its destruction. *See id.* While this situation surely occurs infrequently, one such scenario is when a holographic will is destroyed in the same house fire in which the decedent perished. As long as the propounder of the will is able to demonstrate that the document was stored in one of the approved locations, it appears that North Carolina courts would be amenable to probating a destroyed holographic will that was never "found." *See id.*

35. *See In re* Will of Gilkey, 256 N.C. 415, 420, 124 S.E.2d 155, 158 (1962) ("If the document had been placed among the author's valuable papers without her knowledge and consent, it would of course have no validity as a will even though found among the papers after the author's death."). Construing a similar statute, a Tennessee court clearly stated that relocation of the instrument without the testator's consent is irrelevant:

the testator's death but before it is found, courts analyze where it was kept at the time of death rather than where it was literally discovered.[36]

As a general matter, however, courts do not require affirmative proof that a testator placed a holographic will in the location it is found after the testator's death.[37] Instead, courts presume that either the testator placed it there or it was placed there at the testator's direction.[38] Importantly, however, it is not sufficient for the testator to have kept the holograph in an approved location at just any point before her death—the critical inquiry is where the instrument was kept at the time of death.[39] Thus, for example, testimony regarding where the document was kept eight months before the author's death is inadequate to show that the document meets the requirements of a holographic will.[40] After all, under the statute an instrument does not even *become* a holographic will until the testator dies.[41]

1. Among the Testator's Valuable Papers or Effects

Although "among the testator's valuable papers" and "among the testator's valuable effects" may technically be separate locations,[42] North Carolina courts generally analyze whether the instrument was found among the testator's valuables without regard to whether the objects are papers,

> The fact that the nurse moved the pocketbook [containing the holographic will] after [the testator] was no longer able to watch over her affairs, a few hours before her death, and put it in the trunk in the next room, without her knowledge or consent, cannot alter the situation and require the beneficiaries under the will to show that the trunk was where [the testator] kept her valuable papers.

Pulley v. Cartwright, 137 S.W.2d 336, 340 (Tenn. Ct. App. 1939).

36. *See In re* Westfeldt's Will, 188 N.C. 702, 707–09, 125 S.E. 531, 533–34 (1924) (finding that the decedent's desk was the relevant location to analyze when a maid emptied the contents of the desk into a trunk after the decedent's death and the holographic will was later found in the trunk); *In re* Sheppard's Will, 128 N.C. 54, 55–57, 38 S.E. 27, 28 (1901) (finding that a holographic will written in a book with other important memoranda and located under the testator's body at the time of his death was valid despite the fact that the book later fell behind a bureau).

37. *See In re* Jenkins' Will, 157 N.C. 429, 436, 72 S.E. 1072, 1074 (1911) ("If the paper is so found, it will be presumed that the deposit of it in the place was made by [the testator], or with [the testator's] assent, and in the absence of evidence to the contrary or of suspicious circumstances, no proof of the fact is required.").

38. *Id.*

39. *See* Adams v. Clark, 53 N.C. (8 Jones) 56, 57–58 (1860).

40. *Id.* at 58.

41. N.C. GEN. STAT. § 31-3.4(a)(3) (2017) (stating that a document is not a holographic will until it is "[f]ound after the testator's death" in one of the approved locations); *see also infra* Part III.

42. *See In re* Will of Church, 121 N.C. App. 506, 509, 466 S.E.2d 297, 298 (1996) (enumerating "among the testator's valuable papers" separately from "among the testator's valuable effects").

effects, or a mix of both.[43] Here, the two main definitional tasks are determining what qualifies as "valuable" and what qualifies as "among." The former is read quite broadly; the latter is less clear, but more recent cases have adopted a fairly liberal approach.[44]

Value is evaluated subjectively by assessing what was regarded to be valuable by the decedent.[45] Valuable papers or effects have been described as those that are regarded by the testator as worthy of preservation or that "are kept and considered worthy of being taken care of by the particular person, having regard to his condition, business, and habits of preserv[ation]."[46] Thus, while substantial pecuniary value certainly suffices, a small pecuniary value is not disqualifying. Sentimental value to the decedent is sufficient to qualify an item as a valuable paper or effect.[47] Moreover, the items need not be the decedent's only valuable papers or effects or even the decedent's most valuable papers or effects.[48] When a decedent keeps valuable items in multiple locations (as many individuals do), keeping the holographic will among any of the decedent's valuable papers or effects satisfies the requirement.[49]

For example, in *Stephens v. McPherson*,[50] the testator kept her holographic will in a jewelry box in a spare bedroom.[51] The jewelry box also contained photographs of the testator's nieces and nephews, gas bill

43. *See, e.g.*, *In re* Westfeldt's Will, 188 N.C. 703, 708–09, 125 S.E. 531, 534 (1924) (upholding jury's finding that holographic will was among the decedent's "valuable papers and effects in her desk" where the desk contained both papers and the decedent's "precious treasures").

44. *See infra* notes 45–68 and accompanying text.

45. *In re* Will of Allen, 148 N.C. App. 526, 533, 559 S.E.2d 556, 561 (2002).

46. *In re* Will of Wilson, 258 N.C. 310, 313, 128 S.E.2d 601, 603–04 (1962).

47. *In re Westfeldt's Will*, 188 N.C. at 708, 125 S.E. at 534 ("Papers that have a sentimental and personal value are sometimes more precious and valuable to men and women than stocks and bonds. Sometimes these letters and mementoes of the past are most tenderly kept, frequently in trunks, according to the particular person's condition, business, and habits of preserving papers.").

48. *In re* Jenkins' Will, 157 N.C. 429, 437, 72 S.E. 1072, 1075 (1911). *But see* Lenoir Rhyne Coll. v. Thorne, 13 N.C. App. 27, 33–34, 185 S.E.2d 303, 307–08 (1971) (approving a settlement agreement because the outcome of whether holographic codicil was "among valuable papers" was uncertain when the codicil was found on the testator's sofa among unopened mail and the testator kept other important papers, including an attested will, in a bank lockbox).

49. *See* Winstead v. Bowman, 68 N.C. 170, 174 (1873) ("We think that it is not only possible for a man to have more than one place for keeping his valuable papers and effects, but that men of any considerable estate, or engaged in any considerable business, do in general have two such places or more."). *But see* Brogan v. Barnard, 90 S.W. 858, 858–60 (Tenn. 1905) (finding that a purported holograph was not among the decedent's valuable papers when the decedent was a country postmaster and the document was found at the decedent's store in a box among stamps and stationary belonging to the post office, but all of the decedent's personal valuables were kept in his residence).

50. 88 N.C. App. 251, 362 S.E.2d 826 (1987).

51. *Id.* at 253, 362 S.E.2d at 828.

receipts, and costume jewelry.[52] The testator's important documents were found in a chest of drawers in the same room, in a drawer in the testator's bedroom, and in a hall closet.[53] Even though the other items in the jewelry box had little pecuniary value and the testator had at least three other places in her house that she kept valuable papers, the court found that the holographic will was kept among the testator's valuable papers and effects.[54] Even though the costume jewelry had little monetary value, the court found that it was "obviously of value to" the testator because she wore it regularly and the photographs "may have been of significant sentimental value."[55] The court emphasized that value is measured by what is "*regarded by a decedent* as worthy of preservation."[56]

On occasion, the controversy involves whether the holographic document was "among" other items of value. In these cases, the focal point of the analysis is not whether the other items are "valuable," but whether the holograph was sufficiently proximate to valuable items. After all, it is not the location itself, but rather the holograph's proximity to the testator's other valuables, that is key.[57] Placing a holographic will in an open bowl on a kitchen counter suffices as long as other items of value to the testator are also in the bowl.[58]

When dealing with compartments, a holograph is "among" the other items in the same compartment. However, a holograph in one compartment of a multi-compartment vessel may not be "among" items in another compartment. For example, in the antebellum case of *Little v. Lockman*,[59] the court found that a holograph in one bureau drawer was not "among" the valuable papers in another drawer of the same bureau.[60] However, several factors led the *Little* court to take such a restrictive view of the word "among." One drawer of the bureau contained valuable papers, such as "deeds, notes, and other papers, relating to important transactions . . . tied up in bundles and labeled."[61] The other drawer contained "[p]apers of no

52. *Id.*

53. *Id.*

54. *Id.* at 255–56, 326 S.E.2d at 829–30.

55. *Id.* at 256, 326 S.E.2d at 830.

56. *Id.* at 256, 326 S.E.2d at 829 (quoting *In re* Westfeldt's Will, 188 N.C. 703, 709, 125 S.E. 531, 534 (1924)).

57. *In re* Will of Groce, 196 N.C. 373, 376, 145 S.E. 689, 690 (1928) ("There is no requirement as to the place where the paper writing, and the valuable papers and effects, shall be found.").

58. *In re* Will of Allen, 148 N.C. App. 526, 534, 559 S.E.2d 556, 561 (2002) (mentioning the testator's "apparent style of life" in finding that holographic will in bowl along with insurance, financial, and medical documents was considered among other valuable papers).

59. 49 N.C. (4 Jones) 494 (1857).

60. *Id.* at 497–98.

61. *Id.* at 497.

appreciable value lying loose and scattered over the bottom of [the] drawer," including "several imperfect instruments of a testamentary character."[62] The court regarded the character of the two drawers as entirely different—one was clearly for preserving documents and one appeared to be the decedent's junk drawer.[63] Moreover, because the purported holograph was found among numerous other draft wills, the court found that it was likely that the decedent also considered the purported holograph to be a draft rather than a perfected will.[64]

The "narrow rule" of *Little* has since been criticized for not affording an appropriately liberal construction of the location requirement of the statute.[65] In one such later case, the Supreme Court of North Carolina found that a holographic will was "among" valuable papers and effects where the testator carried all of his valuables on his person and died with his holographic will in an envelope in his coat pocket.[66] In determining the testamentary nature of the instrument, the court made no distinction between the fact that the will was kept in the testator's coat pocket and his other valuables were kept in the pockets of his overalls.[67] While the contents of one bureau drawer were not "among" the contents of another drawer in *Little*, a more liberal construction found that the contents of a testator's coat pockets were "among" the contents of his overalls pockets.[68]

2. In a Safe-Deposit Box or Other Safe Place

The case law is not well developed regarding what constitutes "a safe-deposit box or other safe place."[69] Presumably, holographs that are stored in actual safes or in bank safe-deposit boxes are rarely challenged on the basis of where they were stored. Moreover, other valuable papers or effects would often also be present in a safe or safe-deposit box, and therefore the

62. *Id.*

63. *See id.* at 498 (stating that the decedent "almost certainly" would have put the instrument in the tidy drawer "if he had intended it to operate as a will disposing of his whole estate").

64. *Id.*

65. *In re* Will of Groce, 196 N.C. 373, 376, 145 S.E. 689, 690 (1928).

66. *Id.*

67. *Id.* at 375, 145 S.E. at 690 ("There was also found in the pockets of his coat and of his overalls money in the sum of $1,499.92; also two pencils, a pocket knife, specks, some receipts, etc. The money was found in the pockets of his overalls; it was mostly in bills, although there were three gold pieces, of the value of $40.").

68. *Id.* at 376–77, 145 S.E. at 690–91. *Little* and *In re Will of Groce* may be reconciled, however, because the purported holograph in *Little* was found in what appeared to be a junk drawer. *Little*, 49 N.C. (4 Jones) at 495. In *In re Will of Groce*, the decedent did not appear to have a junk pocket and a tidy pocket. The character of the *In re Will of Groce* decedent's pockets were comparable; thus, no negative inference was drawn from the decedent keeping his holograph in a separate pocket from his money. If all of the drawers in the *Little* decedent's bureau had been comparably tidy, the outcome may well have been different.

69. N.C. GEN. STAT. § 31-3.4(a)(3) (2017).

statutory requirement would also be satisfied independently through that avenue.[70]

One case, *In re Will of Church*,[71] sheds light on what constitutes an "other safe place" under the statute. After the *In re Will of Church* decedent's death, her family and friends found a pocketbook hanging on a hook on the inside of the decedent's bedroom closet door.[72] In the pocketbook, there was an envelope clearly marked as the decedent's will. Inside the envelope was the decedent's holographic will. The pocketbook apparently did not contain any other valuable papers or effects. However, there was another pocketbook across the room hanging on the back of the decedent's bedroom door. That pocketbook contained valuable papers such as the deed to the decedent's home.[73]

The *In re Will of Church* court held that the pocketbook hanging inside the decedent's bedroom closet qualified as an "other safe place" to keep a holographic will.[74] The court's analysis was succinct and focused almost exclusively on the fact that "the testator stored valuable belongings in her pocketbooks, which she kept in her bedroom."[75] Thus, the analysis appears to be highly subjective—as long as the testator considers a similar place to be safe, then that place meets the statutory requirement for a "safe place." However, the evidence relied upon by the court—that the decedent kept other valuable documents in a similar place—leads to almost circular results. If the safeness of a location is measured by whether the decedent thought it was safe, and whether the decedent thought it was safe is measured by whether the decedent keeps valuables in a similar location, then necessarily anywhere similar to a place in which the decedent keeps her valuables is a "safe place." This result seems to ignore that some places are objectively unsafe, regardless of whether or not a decedent routinely stores valuables there.

3. In the Possession or Custody of a Third Party for Safekeeping

When a holograph is deposited with a third party, the critical inquiry is whether it was done so "for safekeeping."[76] In order for it to be a valid will, some sort of instruction must usually accompany the deposit; simply giving the document to a third party is insufficient to meet the statutory

70. *See, e.g.*, Harper v. Harper, 148 N.C. 453, 454, 62 S.E. 553, 554 (1908) (noting that decedent stored his holograph in an iron safe in his dental office along with other valuables).

71. 121 N.C. App. 506, 466 S.E.2d 297 (1996).

72. *Id.* at 507, 466 S.E.2d at 297.

73. *Id.*

74. *Id.* at 509, 466 S.E.2d at 298.

75. *Id.*

76. N.C. GEN. STAT. § 31-3.4(a)(3) (2017).

requirement. For example, a decedent mailing a letter containing handwritten testamentary statements to his attorney did not qualify as "for safekeeping" when there was no language indicating that the attorney should preserve it.[77]

In addition to depositing a holographic will with a third-party individual, the statute also authorizes depositing a holographic will with a "firm or corporation" for safekeeping.[78] Although interpretation of this clause is scarce, one surely acceptable location to deposit a holographic will is in the will depository maintained by the clerk of each county's superior court.[79]

II. LOCATION AND AUTHENTICATING HOLOGRAPHIC WILLS

North Carolina's status as the sole domestic jurisdiction that requires valid holographic wills to be located in particular places at the time of the testator's death raises questions regarding whether the location requirement is founded upon sound policy considerations. These questions arise specifically with respect to the court's task of authenticating wills, a process during which the court must decide whether the testator intended a purported will to be a legally effective expression of her estate plan.[80] In some instances, a purported will is not an authentic expression of testamentary intent because it was prepared as a rough draft, which the testator intended to reconsider and revise prior to giving her final assent to its effectiveness.[81] Alternatively, a purported will might be inauthentic

77. *See In re* Will of Mucci, 287 N.C. 26, 31, 213 S.E.2d 207, 211 (1975) ("There is nothing to indicate that [the decedent] intended for [the attorney] to keep the letter, preserve it, or treat it differently than he would any other letter. That [the decedent] simply mailed the letter to his attorney and executor is not enough for a jury to infer that he had placed it with him for safekeeping as a codicil."); *see also In re* Will of Bennett, 180 N.C. 5, 10, 103 S.E. 917, 919 (1920) ("This letter bears no evidence on its face, nor is there any proof otherwise that [the decedent] intended that it should be deposited with the propounder, or any one else, for safe keeping.").

78. § 31-3.4(a)(3).

79. *Id.* § 31-11 (requiring the clerk of each county's superior court "to keep a receptacle or depository in which any person who desires to do so may file that person's will for safekeeping"); *see also* JOHN PARKER HUGGARD, NORTH CAROLINA ESTATE SETTLEMENT PRACTICE GUIDE § 21:17 (2d ed. 2013) ("The Clerk of every county in North Carolina has a wills receptacle that is available for use without cost by any person who desires to have his will safeguarded.").

80. *See In re Will of Mucci*, 287 N.C. at 30, 213 S.E.2d at 210 ("Before any instrument can be probated as a testamentary disposition there must be evidence that it was written *animo testandi*, or with testamentary intent. The maker must intend at the time of making that the paper itself operate as a will . . . ."); Robert H. Sitkoff, *Trusts and Estates: Implementing Freedom of Disposition*, 58 ST. LOUIS U. L.J. 643, 650 (2014) ("A will that is authentic and volitional is entitled to probate. The testator's estate must be distributed in accordance with the terms of the will.").

81. *See* Hirsch, *Inheritance and Inconsistency*, *supra* note 16, at 1065 ("[M]any persons are given to speak and write off the cuff, many persons commit to words tentative *drafts* of their wills

because it was not prepared by the testator but was instead forged by a wrongdoer attempting to fraudulently benefit from the testator's estate.[82] In either instance, the testator did not possess testamentary intent with respect to the purported will, and consequently the document should not be given legal effect.

Because the testator is dead at the time of probate, the issue of testamentary intent is not necessarily easy for the court to determine.[83] If the testator were alive, she could simply testify regarding her intent, and little doubt would remain regarding a will's authenticity.[84] However, because such testimony is unavailable, the probate court must rely on other evidence of testamentary intent. To address this evidentiary difficulty, the law generally requires the testator to comply with various formalities during her life, which supply the court with evidence of testamentary intent that can be considered after her death.[85]

As explained previously, the formalities for a formal attested will include a written document, the testator's signature, and the signatures of two witnesses.[86] These formalities are intended to provide the probate court with ample evidence of the testator's intent that the will be legally effective.[87] Because the testator likely would not go through the process of complying with these formalities without intending the document to be legally effective, the court can safely presume that a formally compliant will is authentic.[88] Moreover, these formalities make it more difficult for a

and then have second thoughts when the time for inking draws near."); John H. Langbein, *Substantial Compliance with the Wills Act*, 88 HARV. L. REV. 489, 495 (1975) (explaining that "the danger exists that [the testator] may make seeming testamentary dispositions . . . without . . . finality of intention" and observing that "[n]ot every expression that 'I want you to have the house when I'm gone' is meant as a will").

82. *See* Mark Glover, *Decoupling the Law of Will-Execution*, 88 ST. JOHN'S L. REV. 597, 618 (2014) (recognizing the possibility of "the fraudulent admission of a will that the testator never executed").

83. *See* Sitkoff, *supra* note 80, at 646–47 ("A will is a peculiar legal instrument . . . in that it does not take effect until after the testator dies. As a consequence, probate courts follow what has been called a 'worst evidence' rule of procedure. The witness who is best able to [provide evidence of intent] is dead by the time the court considers such issues.").

84. In a few states, a testator may settle the issue of a will's authenticity while she is alive through a process known as antemortem probate. *See* SITKOFF & DUKEMINIER, *supra* note 5, at 309.

85. *See* Langbein, *supra* note 81, at 492 ("The primary purpose of the Wills Act has always been to provide the court with reliable evidence of testamentary intent . . . ; virtually all the formalities serve as 'probative safeguards.'").

86. *See* SITKOFF & DUKEMINIER, *supra* note 5 at 142–43.

87. *See* Langbein, *supra* note 81, at 492.

88. *See* Katheleen R. Guzman, *Intents and Purposes*, 60 U. KAN. L. REV. 305, 311 n.18 (2011) ("Few people would undergo [the will execution] ceremony without holding testamentary intent."); Sitkoff, *supra* note 80, at 647 ("A competent person not subject to undue influence,

potential wrongdoer to pass a forgery through probate, which reduces the concern that a purported will is fraudulent.[89]

Similarly, the formalities with which a testator must comply to execute a valid holographic will are intended to provide the court with evidence of testamentary intent.[90] Like the signature requirement for attested wills, the requirement that the testator sign a holographic will provides the court evidence that the testator gave her final assent to the document and therefore intended it to be a legally effective expression of her estate plan.[91] Additionally, the requirement that a holographic will be handwritten by the testator provides evidence that the document was actually prepared by the testator, thereby reducing the risk that the will is fraudulent.[92] In these ways, a testator's compliance with will execution formalities, whether in the context of an attested will or a holographic will, provides the court evidence that a purported will is authentic.

Just as the writing, signature, and witnessing formalities of attested wills and the signature and handwriting formalities of holographic wills are designed to provide evidence of testamentary intent, North Carolina's location requirement for holographic wills is also meant to provide evidence that the testator intended the will to be legally effective.[93] The Supreme Court of North Carolina expressly drew the connection between the location requirement and testamentary intent when it explained:

> With regard, moreover, to holographic instruments, the necessary *animo testandi* must appear not only from the instrument itself and the circumstances under which it was made, but also from the fact that the instrument was found among the deceased's valuable papers

duress, or fraud is unlikely to execute an instrument in strict compliance with all of the Wills Act formalities unless the person intends the instrument to be his or her will.").

89. *See* Ashbel G. Gulliver & Catherine J. Tilson, *Classification of Gratuitous Transfers*, 51 YALE L.J. 1, 9–13 (1941); Langbein, *supra* note 81, at 496–97.

90. *See* Richard Lewis Brown, *The Holograph Problem—The Case Against Holographic Wills*, 74 TENN. L. REV. 93, 124–25 (2006) ("The rationale for allowing holographic wills largely focuses on the evidentiary function—the notion that the testator's handwriting provides evidence of genuineness and protection against forgery."); Gulliver & Tilson, *supra* note 89, at 13 ("The exemption of holographic wills from the usual statutory requirements seems almost exclusively justifiable in terms of the evidentiary function.").

91. *See* Langbein, *supra* note 81, at 492–93.

92. *See id.* at 498 ("Handwriting has but one virtue: it provides superior evidence of genuineness."). The extent to which the handwriting requirement reduces the risk of forgery is debatable. *See* Reid Kress Weisbord & David Horton, *Inheritance Forgery*, 69 DUKE L.J. (forthcoming 2019/2020) (manuscript at 11) (on file with authors).

93. *See* Theresa A. Bruno, *The Deployment Will*, 47 A.F. L. REV. 211, 231 (1999) ("The statutory purpose for this location requirement was to provide some indication whether the testator wanted the purported document to be considered the last will and testament."); Natale, *supra* note 15, at 199 ("The purpose of this requirement is to provide further evidence of testamentary intent.").

> after his death or in the possession of some person with whom the deceased deposited for safekeeping.[94]

Although the court did not explain how a will's location provides evidence of testamentary intent, the rationale is that if the testator thought the document was of such importance that it should be stored in a safe place or among things of value, then she likely considered the document to be legally significant.[95]

While will execution formalities undoubtedly provide some evidence of testamentary intent, deciding whether a particular formality should be required necessitates a more nuanced analysis than simply stating that the formality is of evidentiary significance. Indeed, policymakers should pursue two primary goals when deciding whether a particular will execution formality should be a requisite for a valid will: accuracy and efficiency.[96]

The first inquiry relates to how well the formality contributes to the accuracy of the will authentication process. The primary goal of the law of wills is to fulfill the testator's intent,[97] and as such, any method of will

94. *In re* Will of Mucci, 287 N.C. 26, 30–31, 213 S.E.2d 207, 210 (1975).

95. *See In re* Will of Gilkey, 256 N.C. 415, 420, 124 S.E.2d 155, 158 (1962) ("The requirement that the writing be found after death among testatrix's valuable papers was to show the author's evaluation of the document, important because lodged with important documents, to become effective upon death because left there by the author . . . ."); Alston v. Davis, 118 N.C. 202, 211, 24 S.E. 15, 17 (1896) ("Where a testator puts away a paper among his valuable papers, or gives it to another for safe-keeping, it is evidence that he wishes it preserved, in order that it may serve the purpose, after his death, for which it purports to have been written."); Winstead v. Bowman, 68 N.C. 170, 176 (1873) ("[T]he script must be found among such papers and effects as show that the deceased considered it a paper of value, one deliberately made and to be preserved, and intended to have effect as a will."); Bruno, *supra* note 93, at 231 ("Serving as evidence of intent, the location among valuable papers demonstrates the testator's evaluation of the importance of the document."); Emily Robey-Phillips, *Reducing Litigation Costs for Holographic Wills*, 30 QUINNIPIAC PROB. L.J. 314, 327 (2017) (explaining that a holographic will's location "can shed light on how the decedent viewed the document" and that a "document treated as valuable suggests that its author had intended it to have *legal effect*"); Claude W. Stimson, Note, *When Is a Holographic Will Dated?*, 5 MONT. L. REV. 82, 87 (1944) ("The fact that a testator considers the document sufficiently valuable to keep with his valuable effects indicates a sort of testamentary intent.").

96. *See* SITKOFF & DUKEMINIER, *supra* note 5, at 141–42 ("The main purpose of these formalities is to enable a court *easily* and *reliably* to assess the authenticity of a purported act of testation." (emphases added)).

97. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003) ("The main function of the law in this field is to facilitate rather than regulate. The law serves this function by establishing rules under which sufficiently reliable determinations can be made regarding the content of the donor's intention."); Sitkoff, *supra* note 80, at 644 ("For the most part . . . , the American law of succession facilitates, rather than regulates, the carrying out of the decedent's intent. Most of the law of succession is concerned with enabling posthumous enforcement of the actual intent of the decedent or, failing this, giving effect to the decedent's probable intent.").

authentication should strive to accurately distinguish authentic wills from those that are inauthentic.[98]

Accuracy, however, is not the only goal that policymakers should consider when crafting a will authentication process; the efficiency of the process should be considered alongside the process's accuracy. Acquiring and evaluating the evidence necessary to make accurate decisions can be costly in terms of the time, money, and effort expended litigating the issue of testamentary intent.[99] Policymakers should therefore consider how a particular formality either eases or increases the burden of making authenticity decisions and ultimately should ensure that the cost of making accurate authenticity decisions does not outweigh the benefit of those decisions.[100] By systematically evaluating the costs and benefits of a will authentication process in this way, policymakers can gain insight into how the law should authenticate wills and, in particular, whether North Carolina's location requirement for holographic wills should be part of that process.

A. Accuracy

The primary goal of any method of will authentication should be to make accurate decisions regarding a will's authenticity.[101] The law should therefore strive to minimize the risk of inaccurate authenticity decisions, which include both false positive outcomes and false negative outcomes. A false positive outcome occurs in the context of will authentication when the court decides that a will is authentic when it is in fact inauthentic.[102] Conversely, a false negative outcome occurs when the court determines that a will is inauthentic when the testator truly intended it to be legally

98. *See* Emily Sherwin, *Clear and Convincing Evidence of Testamentary Intent: The Search for a Compromise Between Formality and Adjudicative Justice*, 34 CONN. L. REV. 453, 467 (2002) ("[T]he objective . . . should be to determine as accurately as possible whether or not the decedent had testamentary intent.").

99. *See* Robey-Phillips, *supra* note 95, at 316 ("[T]he testator's family and friends incur the costs of litigation—time and money—at an emotionally trying time. Additionally, excess litigation takes up sparse judicial resources, harming the judicial system.").

100. *See* James Lindgren, *The Fall of Formalism*, 55 ALB. L. REV. 1009, 1033 (1992) ("[W]e should ask . . . whether [a method of will authentication] promotes the intent of the testator at an acceptable administrative cost."); Peter T. Wendel, *Wills Act Compliance and the Harmless Error Approach: Flawed Narrative Equals Flawed Analysis?*, 95 OR. L. REV. 337, 390 (2017) ("The challenge in creating and applying a Wills Act is how to balance the competing public policy consideration of testator's intent, costs of administration, and potential for misconduct.").

101. *See* Sherwin, *supra* note 98, at 467.

102. *See* Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855, 880 (2012) ("False positives (or Type I errors) involve probating documents that are not animated by testamentary intent . . . ."); Sitkoff, *supra* note 80, at 647 (stating that "a false positive" involves "a spurious finding of authenticity").

effective.[103] Under both scenarios, the court makes an incorrect authenticity decision, and therefore the most accurate will authentication process would minimize the combined risk of false positive outcomes and false negative outcomes.

Because minimization of inaccurate authenticity decisions is a primary goal of any method of will authentication, the first consideration relevant to an analysis of North Carolina's location requirement is how it contributes to the accuracy of the will authentication process. As discussed previously, the fact that a purported holographic will is discovered among the testator's valuable papers or in some secure location provides some assurance that the testator considered the document to be valuable and worthy of preservation, which, in turn, suggests that the testator also likely considered the document to be a legally effective will.[104] Thus, when a purported holographic will is discovered in one of the places mandated by the location requirement, a finding of authenticity carries a reduced risk of producing a false positive outcome.

Although the requirement that a will be found among the testator's valuable papers or other safe place likely reduces the risk of false positive outcomes, policymakers must also consider how the location requirement affects the risk of false negative outcomes. In contrast to false positive outcomes, which occur when an inauthentic will is validated despite the satisfaction of the location requirement,[105] a false negative outcome occurs when an authentic will is invalidated because it does not satisfy the location requirement.[106] Because the location requirement is mandatory, all purported holographic wills that are not discovered in one of the prescribed locations are invalid.[107] This is potentially problematic because anytime the law requires the testator to comply with some sort of technicality, there is a risk that a well-meaning decedent's intended will suffers invalidation based on a mistaken failure to comply with the technicality.[108] In this regard, the

103. *See* Kelly, *supra* note 102, at 880 ("False negatives (or Type II errors) involve not probating documents that are animated by testamentary intent . . . ."); Sitkoff, *supra* note 80, at 647 (stating that a "false negative" occurs when a will is denied probate despite "overwhelming evidence of authenticity").

104. *See supra* notes 93–95 and accompanying text.

105. *See* Kelly, *supra* note 102, at 880; Sitkoff, *supra* note 80, at 647.

106. *See* Kelly, *supra* note 102, at 880; Sitkoff, *supra* note 80, at 647.

107. *See* Natale, *supra* note 15, at 200 ("Failure to satisfy this requirement, as with other statutory formalities, results in invalidation of the will.").

108. *See* Mark Glover, *Formal Execution and Informal Revocation: Manifestations of Probate's Family Protection Policy*, 34 OKLA. CITY U. L. REV. 411, 431–34 (2009) ("[W]ill formalities are barriers to the valid execution of a will. Put differently, absent formalities, testators would more easily exercise their testamentary power."); Sherwin, *supra* note 98, at 457 ("[F]ormality rules for will execution prevent mistakes about intent and provide a means for

location requirement is a technical hurdle,[109] just like any other will execution formality, that can trip up the unwary testator and render an authentic will invalid, thereby presenting a risk of false negative outcomes.

Given the nature of holographic wills, the location requirement is a particularly onerous and worrisome technicality. Indeed, there are a variety of reasons why an authentic holograph might not be discovered in a place that satisfies the requirement.[110] First, the vast majority of holographic wills are prepared without the assistance of legal counsel,[111] and, as such, testators who leave behind holographic wills likely are unaware of the location requirement.[112] The general public's knowledge of the particularities of the law of succession is questionable,[113] and the unfamiliarity of the location requirement for holographic wills likely is

expressing intent. At the same time, in a significant number of cases they may frustrate not only an individual testator's intent but also the principal objective of the law of wills.").

109. *See* Natale, *supra* note 15, at 200 ("While the 'valuable papers or effects' requirement is designed to provide evidence of testamentary intent, it imposes an additional technical requirement upon testators who wish to execute a valid holographic will.").

110. *See* Robey-Phillips, *supra* note 95, at 331 ("[O]ne can imagine a variety of circumstances in which a valid holograph might fail to make its way to safekeeping or the testator's valuable papers.").

111. *See* Brown, *supra* note 90, at 122 ("[T]he majority of holographic wills are drafted by lay people . . . ."); Karen J. Sneddon, *Speaking for the Dead: Voice in Last Wills and Testaments*, 85 ST. JOHN'S L. REV. 683, 733 (2011) ("[T]he holographic will removes the attorney draftsperson from the process."); *see also* Langbein, *supra* note 81, at 524 ("Today lawyers in holograph jurisdictions have their clients' wills executed as attested wills; that is, they opt for maximum formality . . . .").

112. *See* Natale, *supra* note 15, at 200 ("Although the merits of the testamentary intent requirement are apparent, holographic wills may be denied probate merely because a testator was ignorant of the requirements of the law, or because he neglected or forgot to place the will among his valuable papers or effects or in the possession of another entity for safekeeping."). Unfamiliarity with estate planning and the surrounding law might be a particularly likely trait of testators who execute holographic wills. *See* Clowney, *supra* note 4, at 47 ("Skeptics suggest that laymen need help navigating the details of local estate law. The wills uncovered in Allegheny County provide brick and mortar support for this position. Without question, homemade testaments betray their authors' lack of familiarity with basic tenets of professional estate planning. The data show that laymen routinely craft flawed legal documents.").

113. *See* Boni-Saenz, *supra* note 14, at 338–39 ("One may have the motivation to engage in estate planning but lack the resources to do so effectively. . . . One important resource is the specialized legal knowledge about formalistic inheritance law doctrines. This includes not only substantive knowledge of the body of law in a given state but also knowledge of how to communicate one's donative preferences in a way that is intelligible to the state's probate system. . . . [B]ecause donors are one-time players in the game of life and death, . . . this type of knowledge is likely to be rare in the population."); *see also* Gulliver & Tilson, *supra* note 89, at 12 ("It is extremely improbable that laymen would be aware of the legal rules concerning the competency of attesting witnesses without legal advice . . . ."); Adam J. Hirsch, *Default Rules in Inheritance Law: A Problem in Search of Its Context*, 73 FORDHAM L. REV. 1031, 1055 (2004) ("Intestacy law is . . . relatively obscure."); Reid Kress Weisbord, *Wills for Everyone: Helping Individuals Opt Out of Intestacy*, 53 B.C. L. REV. 877, 906 (2012) ("[T]he testamentary process is obscure, unfamiliar, and complex.").

particularly acute given the uniqueness of the requirement to North Carolina.[114]

Furthermore, testators of holographic wills are ordinarily less affluent than those who execute attested wills.[115] Accordingly, even if a testator is aware of the location requirement, she might not have a safe-deposit box in which to store her holograph, or she might not have other valuable papers or many valuable effects with which to place it. Other testators execute holographic wills due to isolation.[116] Attested wills require witnesses, and if the testator cannot find individuals whom she is comfortable serving as witnesses, then she likely also lacks individuals whom she trusts to safeguard her will. Finally, some testators execute holographic wills in emergencies.[117] In such situations, not only might the testator lack the opportunity to comply with the formalities for attested wills,[118] but she might also lack the opportunity to comply with the location requirement.[119]

114. Of course, some laymen will be aware of the location requirement. *See, e.g.*, *In re* Will of Groce, 196 N.C. 373, 375, 145 S.E. 689, 690 (1928) ("Deceased had also said, a short time before his death, to a neighbor, that 'a man could make a will, and not have witnesses. He could *put it with his papers* and the neighbors could swear to his handwriting.'" (emphasis added)).

115. *See* Clowney, *supra* note 4, at 45 ("Despite the remarkable wealth of a few, careful examination of the record reveals that many of the very poorest willmakers also gravitate toward holographs. Over 20% of testators in this study died with less than $10,000 in net probate assets. All in all, it seems that while holographs have become an essential tool for testators with modest assets, the claim that handmade testaments amount to 'trailer park wills' still carries some water.").

116. *See* Horton, *Wills Law*, *supra* note 4, 1137–38 (reporting an example of a holographic will that "begins by declaring that '[s]ince it is too hard finding willing witnesses to sign my will, I am rewriting the entire will by hand'" (alteration in original)); C. Douglas Miller, *Will Formality, Judicial Formalism, and Legislative Reform: An Examination of the New Uniform Probate Code "Harmless Error" Rule and the Movement Toward Amorphism, Part Two: Uniform Probate Code Section 2-503 and a Counterproposal*, 43 FLA. L. REV. 599, 629–30 (1991) ("[G]iving testators the option of executing a holographic will may reflect legislative intent to permit a limited exception to the attestation requirement in order to . . . protect the occasional testator who is unable or unwilling to procure witnesses."); Robey-Phillips, *supra* note 95, at 315 ("Because no witnesses are required [for a holographic will], isolated people can access testacy.").

117. *See* Clowney, *supra* note 4, at 58 ("Fully 10% of the holographs discovered in Allegheny County constituted . . . deathbed wills."); Horton, *Wills Law*, *supra* note 4, at 1137 (explaining that holographs facilitate "emergency room wills: spontaneous dispositions by those in dire straits").

118. *See* Clowney, *supra* note 4, at 58 ("In the emergency room and on the operating table, testators may handwrite their last wishes because they lack the time to find witnesses or discuss things with an attorney."); Lawrence M. Friedman, Christopher J. Walker & Ben Hernandez-Stern, *The Inheritance Process in San Bernardino County, California, 1964: A Research Note*, 43 HOUS. L. REV. 1445, 1466 (2007) ("Many of the holographs were written within days of death—they were almost literally death-bed wills, which may explain why there was no time for lawyers, witnesses, or typewriters.").

119. In one famous case, a dying farmer used a pocketknife to etch his holographic will into the fender of the tractor under which he was pinned. *See* SITKOFF & DUKEMINIER, *supra* note 5, at 209.

Therefore, while the location of a holographic will is relevant to the issue of testamentary intent, requiring that a holographic will be located in a particular place presents a risk that the law will invalidate truly authentic wills.

At times, the Supreme Court of North Carolina has recognized that the location requirement limits the testator's ability to leave behind a legally effective holographic will and consequently presents a risk of generating false negative outcomes.[120] For example, in a nineteenth-century opinion, the court explained, "[I]t is objected that a construction which would reject a paper, found under the circumstances proved in this case, is too strict, and may disappoint the intention of many persons who wished, and intended to die testate."[121] While the court acknowledged this concern, it summarily dismissed it when it stated that such a construction "will be more likely to uphold the policy of the statute in its attempt to prevent heirs, and next of kin, from being deprived of their just rights," which is "the beneficent purpose of the statute."[122] In this excerpt, the court identified minimization of false positive outcomes as the objective of the location requirement because the protection of heirs and next of kin is achieved by ensuring that only those wills that are extremely likely to be authentic are validated. While the court seemed to correctly identify the policy objective of the location requirement, it did not accurately characterize the merit of that policy, at least not under modern conditions.[123]

Because the overarching goal of the law of wills is to carry out the testator's intent,[124] the court correctly characterized avoiding false positive outcomes as a "beneficent purpose."[125] However, the court ignored the

120. *See* Winstead v. Bowman, 68 N.C. 170, 176 (1873) (suggesting that "[t]he policy of our statute seems to have been to restrict the facility with which testamentary papers were allowed probate in the English Courts" but cautioning that "[i]t was not the intention of the Legislature to destroy, or unreasonably restrict, the power of making a holographic will; but simply to assure that the writing offered as a will was really and deliberately intended as such").

121. Little v. Lockman, 49 N.C. 494, 498 (1857).

122. *Id*.

123. In earlier times, false positive outcomes might have been more costly than false negative outcomes, and consequently, a nineteenth-century court focusing exclusively on the location requirement's protection against false positive outcomes may be justified. However, in modern times, the cost of false positive outcomes and false negative outcomes are more equal, and therefore a will authentication process should strive to minimize the combined risk of error. *See generally* Mark Glover, *Probate-Error Costs*, 49 CONN. L. REV. 613, 643 (2016) ("[U]nder current conditions, probate-error costs are now more symmetric than they once were.").

124. *See* Whitehurst v. Gotwalt, 189 N.C. 577, 580, 127 S.E. 582, 584 (1925) ("It is the duty of the courts to effectuate the intention of the testator, and this is the cardinal principle in the interpretation of wills to which all other rules must bend, unless that intention be contrary to public policy or the settled rules of law."); RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 10.1 cmt. c (AM. LAW INST. 2003).

125. *Little*, 49 N.C. at 498.

equally laudable goal of avoiding false negative outcomes. As explained at the outset, incorrect authenticity decisions are reached both when the court validates an inauthentic will (i.e., a false positive outcome) and when it invalidates an authentic will (i.e., a false negative outcome).[126] Both types of incorrect authenticity decisions undermine the testator's intent, and, therefore, protection against false positives outcomes should not be favored over protection against false negative outcomes.[127] By exclusively praising the requirement's minimization of false positive outcomes, the court failed to consider that the requirement also produces a potentially significant risk of false negative outcomes.

Due to this heightened risk of false negative outcomes, the location requirement is problematic from an evidentiary perspective; however, it might have merit from a protective standpoint. Instead of simply providing evidence that the testator viewed the purported holographic will as a legally effective document, the location requirement might increase the accuracy of the will authentication process by reducing the risk that a purported holographic will is a forgery.[128] In an early opinion, the Supreme Court of North Carolina specifically referenced the protective function of the location requirement by stating that the requirement contributes to "the protection of the heirs-at-law, and next of kin of a decedent, from the effect of a forged or false paper as a will."[129]

Theoretically, the location requirement makes a wrongdoer's task more difficult. With this additional requirement in place, a fraudster must not only produce a document that appears to be written and signed by the hand of the purported testator but also place that forgery in a location that indicates the purported testator intended to preserve and protect the forgery. By establishing an additional hurdle over which a prospective wrongdoer must pass, the location requirement might reduce the likelihood that a fraudulent will is probated, thereby decreasing the risk of false positive outcomes.

126. *See supra* notes 101–03 and accompanying text.

127. *See* Sherwin, *supra* note 98, at 463 ("[A]n erroneous decision upholding an informal will is [not] substantially more costly than an erroneous decision rejecting an informal will . . . [because] an error either way results in a disposition the testator does not want."); Sitkoff, *supra* note 80, at 647 ("Both kinds of error dishonor the decedent's freedom of disposition. [A false positive outcome] gives effect to a false expression of testamentary intent; [a false negative outcome] denies effect to a true expression of testamentary intent.").

128. *See* R. Gray Williams, *Some Suggested Changes in the Law of Wills in Virginia*, 2 VA. L. REG. (n.s.) 401, 406 (1916) ("North Carolina . . . offer[s] additional safeguards against forgery by the provision that the holograph document must be found in the valuable papers of the deceased or lodged with a third person for safekeeping.").

129. *Little*, 49 N.C. at 496.

Given that the location requirement produces a substantial risk of false negative outcomes,[130] the protection from forgery and the attendant reduction in the risk of false positive outcomes must be significant in order for the location requirement to increase the overall accuracy of the will authentication process. However, for two pragmatic reasons, the protective merit of the location requirement is questionable, and as such, any theoretical improvement in the authentication process's accuracy is doubtful. First, it seems unlikely that the location requirement would serve as a meaningful obstacle for a determined wrongdoer.[131] To be sure, if the location requirement were restricted to a safe-deposit box, then perhaps a potential perpetrator of fraud would find it significantly more difficult to obtain access to the prescribed location.[132] However, the location requirement is not so limited.

Consider, for instance, the possibility that a purported holographic will is in the possession of someone other than the testator at the time of the testator's death. If the court determines that the testator deposited the will with that individual for safekeeping, then the location requirement is satisfied. However, one who forges a holographic will could perpetuate the fraudulent scheme by claiming that the testator gave the document to her for safekeeping or by recruiting a conspirator to take possession of the forgery.[133] Likewise, consider the possibility that a purported holograph is discovered among the testator's valuable papers. If a wrongdoer lodges a forged holographic will among the testator's effects during the testator's life, then the possibility exists that the testator will discover the forgery and destroy it. However, the wrongdoer could attempt to place the forgery

130. *See supra* notes 105–27 and accompanying text.

131. The same point has been used to question the protective function of other will execution formalities. *See* Langbein, *supra* note 81, at 496 ("The attestation formalities are pitifully inadequate to protect the testator from determined crooks . . . ."); James Lindgren, *Abolishing the Attestation Requirement for Wills*, 68 N.C. L. REV. 541, 555 (1990) [hereinafter Lindgren, *Abolishing*] ("Because it is fairly easy to find two agreeable witnesses, very little fraud, duress, or undue influence is prevented. Most crooks are careful enough not to be tripped up by a simple formality.").

132. *See* Lindgren, *Abolishing*, *supra* note 131, at 571 (suggesting that one "way to handle unwitnessed wills would be to require some special proof to establish them" and more particularly that "[t]hose more concerned about forgery" might prefer that "a will's genuineness" be established by the fact "that it was found in the testator's safety deposit box"); Robey-Phillips, *supra* note 95, at 331 ("If the document is discovered . . . in [the testator's] safe-deposit box . . . and meets both the handwriting and signature formalities, a presumption of validity should arise."). *But see* Weisbord & Horton, *supra* note 92, at 42 ("In case after case, the proponent of a sham will claims to have 'discovered' it in a file cabinet or a safe deposit box . . . .").

133. This scenario can arise even in jurisdictions that do not have a location requirement for wills. *See* Weisbord & Horton, *supra* note 92, at 42 ("In one far-fetched scheme, a woman contended that the testator entrusted her with the [sham] will, inexplicably told her to 'keep it confidential,' and did not bat an eyelash when she proceeded to 'roam the world' with the document inside her motor home.").

among the testator's valuable papers after the testator's death. Under all of these scenarios, the protective function of the location requirement is undermined by a determined wrongdoer whose fraudulent scheme includes not only producing a forgery but also depositing the forgery in a place that satisfies the location requirement.

The second reason why the location requirement's protective function likely does not significantly reduce the risk of false positive outcomes is that there is little risk of forgery in the absence of the location requirement. Scholars and judges have long suggested that the handwriting requirement already provides robust protection against forged wills because it ensures that persuasive evidence exists that the testator actually prepared the document.[134] Empirical evidence supports this theory, as probate data from Pennsylvania reveals that few concerns are raised during the probate of holographic wills regarding the possibility of fraud or other types of wrongdoing that could bear on the issue of testamentary intent.[135]

In sum, North Carolina's policymakers have serious reason to question whether the state's idiosyncratic location requirement for holographic wills increases the accuracy of the will authentication process. Although the requirement likely reduces the risk of false positive outcomes by mandating that the testator leave behind an additional piece of evidence regarding testamentary intent, it also likely increases the risk of false

134. *See In re* Dreyfus' Estate, 165 P. 941, 941 (Cal. 1917) ("There can be no doubt that [holographic will statutes] owe[] [their] origin[s] to the fact that a successful counterfeit of another's handwriting is exceedingly difficult, and that therefore the requirement that it should be in the testator's handwriting would afford protection against a forgery . . . ."); Gulliver & Tilson, *supra* note 89, at 13 ("The requirement that a holographic will be entirely written in the handwriting of the testator furnishes more complete evidence for inspection by handwriting experts than would exist if only the signature were available, and consequently tends to preclude the probate of a forged document."); Lindgren, *Abolishing*, *supra* note 131, at 558 ("Handwriting merely provides a larger handwriting sample, which reduces the chance of forgery."). *But see* Adam J. Hirsch, *Formalizing Gratuitous and Contractual Transfers: A Situational Theory*, 91 WASH. U. L. REV. 797, 827 (2014) [hereinafter Hirsch, *Formalizing*] ("Once upon a time, people corresponded by posted letter, often written out longhand. Expert witnesses could compare the handwriting found in a holographic will with other documents shown to have been penned in the testator's hand. In the age of e-mail and telephonic texting, however, the handwriting that appears in a holograph could lose its probative value—the testator might leave behind few other samples of his or her handwriting with which the holograph can be compared.").

135. *See* Clowney, *supra* note 4, at 60 ("Of particular note, the record suggests that neither forgery nor deceit poses a significant threat to the integrity of do-it-yourself willmaking; this study found no evidence of counterfeit documents and turned up only one allegation of undue influence."); *see also* Lindgren, *Abolishing*, *supra* note 131, at 558 ("[F]orged wills are rare."); Weisbord & Horton, *supra* note 92, at 35 ("[W]e found only two decisions that held that a holograph was forged. . . . Apparently, despite the questionable reliability of forensic handwriting analysis, forgers remain sufficiently concerned about the possibility of detection to prefer typewritten forgeries that require handwritten fabrication of only the decedent's signature."). *But see* John J. Harris, *Genuine or Forged?*, 32 CAL. ST. B.J. 658, 660 (1957) ("Most [forged] wills are holographic.").

negative outcomes because many testators of holographic wills lack the knowledge and opportunity to comply with the requirement. Ultimately, because it indiscriminately invalidates truly authentic wills that are not discovered in one of the prescribed locations, the requirement's role in increasing the accuracy of the will authentication process is questionable at best, and, at worst, it might actually decrease the accuracy of the process.

B. Efficiency

The second primary goal of any method of will authentication is to provide courts with an efficient way to distinguish authentic wills from inauthentic wills.[136] Indeed, policymakers should ensure that the benefits of making accurate authenticity decisions are not offset by the costs of making those decisions.[137] For instance, if the law were to give probate courts absolute discretion to make authenticity decisions, the will authentication process could become burdensome. The court would be charged with ascertaining the testator's subjective intent, a task that would not necessarily be easy.[138] Direct observation of the testator's intent is impossible,[139] and, because the testator is dead at the time of probate, the testator's testimony regarding her intent is unavailable.[140] As such, the court would consider every piece of evidence that could bear on the issue of testamentary intent, and, in turn, litigation regarding the authenticity of wills might clog the probate system.[141]

However, by directing probate courts to look for specific objective evidence of testamentary intent in the form of a document that complies with prescribed formalities, the law streamlines the courts' decisionmaking

136. *See* Wendel, *supra* note 100, at 382 ("[O]ne of the important public policy considerations . . . is . . . the costs of administration associated with ascertaining and giving effect to testator's intent."). Indeed, policymakers should consider efficiency when crafting any type of legal decisionmaking process. *See* Adam J. Hirsch, *Testation and the Mind*, 74 WASH. & LEE L. REV. 285, 367 (2017) [hereinafter Hirsch, *Testation*] ("Like other landscapes, the legal landscape is an environment of scarce resources. The success and even wisdom of a rule depends in no small measure on its frugality.").

137. *See supra* note 99 and accompanying text.

138. *See* Hirsch, *Testation*, *supra* note 136, at 287 ("The mind of a testator teems with data, but data that is difficult to access, and assess, without risk of inaccuracy or misrepresentation. Death compounds those risks.").

139. *See* Mary Louise Fellows, *In Search of Donative Intent*, 73 IOWA L. REV. 611, 656 (1988) (referencing "the impossible search for subjective intent"); *cf.* Jan Klabbers, *How to Defeat a Treaty's Object and Purpose Pending Entry into Force: Toward Manifest Intent*, 34 VAND. J. TRANSNAT'L. L. 283, 303 (2001) ("[A]s a philosophical truism, it may be well-nigh impossible to identify someone else's subjective intent; to paraphrase an ancient maxim, not even the devil knows what is inside a man's head.").

140. *See* Sitkoff, *supra* note 80, at 647.

141. *See* Guzman, *supra* note 88, at 316 (explaining that "an ad hoc, pure intent approach would" produce a "vastly increased likelihood of . . . litigation").

process.[142] No longer is the court's focus the subjective issue of the testator's intent; instead, the court must decide the objective issue of whether the testator complied with the prescribed formalities.[143] For example, in the context of attested wills, the court need not consider all potential evidence of testamentary intent but must simply look at the face of the document and determine whether the signatures of the testator and witnesses are present.[144] In some instances, questions regarding the authenticity of the signatures might need to be resolved, but the court's task of evaluating these objective issues is generally easier to decide than the subjective issue of the testator's intent.[145] Moreover, when it comes to the testator's compliance with external formalities, a presumption of testamentary intent is triggered if the testator complied,[146] or a presumption of the lack of testamentary intent is triggered if the testator failed to comply.[147] These presumptions end the will authentication process in most cases,[148] which in turn limits the costs of litigating the issue of intent.[149]

142. *See* Langbein, *supra* note 81, at 494 ("Compliance with the Wills Act formalities for executing witnessed wills results in considerable uniformity in the organization, language, and content of most wills. Courts are seldom left to puzzle whether the document was meant to be a will."); Lindgren, *Abolishing*, *supra* note 131, at 554 ("[F]ormalities channel almost all wills into the same patterns, letting well-counseled testators know what they must do to execute a valid will, reducing the administrative costs of determining which documents are wills, and thus increasing the reliability of our system of testation.").

143. *See* Hirsch, *Testation*, *supra* note 136, at 290 ("The essence of a will is testamentary intent. This volitional attribute defines the category, distinguishing wills from other transfers of property. Lawmakers need not, however, rely on a state-of-mind rule to discover intent. The protocols accompanying a transfer could serve as an external standard to determine its character.").

144. In some states, the primary formalities of a writing, the testator's signature and attestation by two witnesses, are supplemented by ancillary formalities, such as the requirement that the testator and witnesses be in each other's presence at the time that they sign the will. *See* SITKOFF & DUKEMINIER, *supra* note 5, at 142–43. The court's task of evaluating formal compliance can be more difficult if issues arise regarding the presence requirement because the court must consider extrinsic evidence regarding the will execution ceremony. *See* Thomas E. Simmons, *Wills Above Ground*, 23 ELDER L.J. 343, 358 (2016) ("[A] defect in the presence requirement would only be ascertainable upon deposing the witnesses . . . .").

145. The comparative ease of deciding the objective issue of formal compliance results from the limited scope of the factual inquiry. *See* Hirsch, *Testation*, *supra* note 136, at 363–64 ("Thoughts cost more than a proverbial penny, but so too do other items of evidence. Lawmakers can compare recourse to an external standard with a related state-of-mind rule and decide which provides greater value (i.e., accuracy) for money. . . . When might we expect a state-of-mind rule to prove comparatively efficient? The question could hinge on the scope of the factual inquiry required to carry out objective policy. Where that inquiry is narrow, an external standard becomes more reliable and cheaper to apply.").

146. *See* Langbein, *supra* note 81, at 500 (explaining that the "fundamental requisite[]" of "testamentary intent [is] presumed from due execution").

147. *See id.* at 489 ("[O]nce a formal defect is found, Anglo-American courts . . . conclude[] that the attempted will fails.").

148. If the testator complies, the presumption of testamentary intent can be rebutted in some circumstances, but arguments that formally compliant wills do not reflect testamentary intent are

Like the formalities of attested wills, the formalities of holographic wills streamline the process of authentication but in different ways and perhaps to differing degrees. The requirement that the testator sign a will is largely the same for both attested and holographic wills,[150] and consequently the court's task of evaluating the testator's compliance likely is not more difficult for one type over the other.[151] The requirement that the testator write a holographic will by hand poses the same difficulty as the signature requirement, as the court might be faced with questions regarding whether the handwriting is truly the testator's.[152] However, both the handwriting and signature formalities are objectively verifiable facts that are generally easy for the court to determine.[153] Importantly, the court need

rare. *See infra* notes 159–62 and accompanying text. If the testator fails to comply, the presumption of the lack of testamentary intent is conclusive in most states, which means that the court need not consider evidence that a non-complaint will is authentic. *See* Sitkoff, *supra* note 80, at 647–48.

149. *See* Hirsch, *Testation*, *supra* note 136, at 296 ("By calling on courts to judge a testator's volitional state of mind, we would impose on courts an evidentiary burden that raises their decision costs. By barring such evidence, we would lessen those costs."); *see also* Hirsch, *Formalizing*, *supra* note 134, at 804 ("In economic terms, . . . we can justify the imposition of expensive formalities on parties as functioning to avoid spillover costs—internalizing the negative externality created by the state-supported construction proceedings for transfers formulated in ambiguous ways."); David Horton, *Tomorrow's Inheritance: The Frontiers of Estate Planning Formalism*, 58 B.C. L. REV. 539, 577 (2017) ("[T]he need to prevent spillover costs—not the desire to carry out the decedent's intent—furnishes the most forceful reasons to take the Wills Act at its letter.").

150. One primary difference in the signature requirement for attested and holographic wills is that an attested will can be signed by someone other than the testator who places the testator's name on the document at the direction of the testator, but a holographic will must be signed by the testator's own hand. *Compare* N.C. GEN. STAT. § 31-3.3(b) (2017), *with id.* § 31-3.4(a)(2).

151. The signature requirement might occasionally be more difficult to decide for holographic wills than for attested wills because testators sometimes sign holographic wills in an informal manner, such as by using terms such as "Mom" or "Brother." *See, e.g.*, Wise v. Short, 181 N.C. 320, 321, 107 S.E. 134, 135 (1921) (involving a purported will signed "Brother Alex"); Hughes v. Craddock, 207 N.C. App. 748, 701 S.E.2d 404, 2010 WL 4290228, at *7 (2010) (unpublished table decision) (involving a purported will signed "Mom"). In these cases, the court must decide not only whether the testator actually placed the mark on the document but also whether "the maker adopted [the mark] as her own for the purpose of executing the instrument." *In re* Will of Southerland, 188 N.C. 325, 328, 124 S.E. 632, 633 (1924).

152. *See, e.g.*, *In re* Will of Wall, 216 N.C. 805, 805, 5 S.E.2d 837, 837 (1939) ("The significant controversy at the trial was as to whether [a portion of a purported holographic will] was in the handwriting of the supposed testatrix.").

153. Even when the necessary threshold of evidence differs between attested and holographic wills, whether the formality requirements have been met remains a relatively easy matter for courts to assess. For example, the testator's handwriting and signature on a holographic will must be supported by testimony from three witnesses. N.C. GEN. STAT. § 28A-2A-9(1) (2017). For an attested will, various combinations of evidence are acceptable to prove the testator's signature, and the testimony of only two attesting witnesses is sufficient. *Id.* § 28A-2A-8(a). While it may be easier for the propounder of a will to prove an attested will by bringing forth two witnesses rather than three, it is no more or less difficult for a probate court to assess whether two or three witnesses testified in support of the decedent's signature.

not immediately address the murkier, subjective issue of whether the testator truly intended the purported holographic will to be legally effective.

A finding that the testator complied with the formalities for holographic wills, however, does not eliminate the need for the court to consider the subjective issue of testamentary intent, as the testator's compliance with the signature and handwriting requirements is necessary, but not sufficient, for the validity of holographic wills.[154] Because of the informal nature of holographic wills, the testator's compliance with holographic will formalities does not trigger a presumption of testamentary intent. Whereas, in most instances, formal attested wills are unquestionably testamentary in nature because they are typically captioned the "last will and testament" of the testator and clearly express testamentary gifts,[155] some purported holographic wills that comply with the prescribed formalities are nonetheless not clearly testamentary in nature. They are not clearly labeled as the testator's will,[156] and they do not necessarily describe the testator's estate plan.[157] Thus, the court must still determine whether a

154. *See In re* Will of Mucci, 287 N.C. 26, 30, 213 S.E.2d 207, 210 (1975) ("With regard . . . to holographic instruments, the necessary *animo testandi* must appear not only from the instrument itself and the circumstances under which it was made, but also from the fact that the instrument was found among the deceased's valuable papers . . . ."); *In re* Will of Lamparter, 126 N.C. App. 593, 598, 486 S.E.2d 458, 461 (1997) ("In addition to the statutory requirements for a holographic will, our Supreme Court has held that it is necessary to establish testamentary intent . . . ."), *rev'd on other grounds*, 348 N.C. 45, 497 S.E.2d 692 (1998).

155. *See* Guzman, *supra* note 88 at 311 n.18 ("[A] typical document would include the caption 'Last Will and Testament' and continue restating the document's purpose . . . ."); Karen J. Sneddon, *In the Name of God, Amen: Language in Last Wills and Testaments*, 29 QUINNIPIAC L. REV. 665, 694 (2011) ("The first characteristic of the genre of wills is the lyrical title 'Last Will and Testament.' The title of the document conveys the 'animus testandi,' the testamentary intention.").

156. *See* Brown, *supra* note 90, at 110 ("[H]olographic wills invite suspicion as to the existence of testamentary intent [because they] are often informal documents, such as letters or memoranda, which lack any formal designation as a will or last testament."). *But see* Clowney, *supra* note 4, at 60 ("Nine times out of ten testators labeled their holographs 'Last Will & Testament' or 'My Will.'"). Some have suggested that policymakers could treat a label such as "Last Will and Testament" as a will execution formality. *See, e.g.*, Hirsch, *Inheritance and Inconsistency*, *supra* note 16, at 1076 ("Lawmakers could . . . jettison the witnessing requirement, but mandate that every will (including wholly handwritten ones) contain some other tangible expression of formality, such as a testamentary *heading* on the document."); Robey-Phillips, *supra* note 95, at 331 ("If a document is handwritten in its material provisions, signed, and labeled a will or testament, a presumption of validity should arise.").

157. *See* Hirsch, *Inheritance and Inconsistency*, *supra* note 16, at 1073–74 ("[C]ourts must contend with nettlesome questions concerning the intent of authors to render legally effective holographic documents that are offered for probate as wills. (Those nettles are most prickly when a holograph mixes testamentary declarations with ordinary communication, as when the alleged will appears within a diary or a letter to the alleged beneficiary.)." (footnote omitted)). *But see* Clowney, *supra* note 4, at 60 ("Even in cases where the documents submitted for probate lacked a proper label, testators typically employed dispositive language [and] mentioned death . . . .").

purported holographic will expresses testamentary intent even though the document is handwritten and signed. Despite this additional step in the authentication process, the formalities for holographic wills streamline the process because the initial formality analysis excludes all non-compliant purported holographic wills from the secondary analysis of intent.[158] In this way, reliance on formalities as evidence of intent promotes the efficiency of the will authentication process.

Nonetheless, the fact that the court must undertake the secondary analysis of whether the testator intended a formally compliant holographic will to be legally effective should mean that there is significantly greater opportunity for litigation than if the court simply focused on the testator's formal compliance. In reality, however, this is not necessarily the case. In the context of attested wills, challengers in some jurisdictions have the opportunity to question the testamentary intent of formally compliant wills.[159] In other words, the court's finding that the testator complied with the prescribed formalities does not foreclose litigation regarding the subjective intent of the testator.[160] Despite this opportunity, litigation of this type is rare.[161] Therefore, if the subset of wills that satisfy the formalities of attested wills does not generate significant litigation regarding the possibility that the testator did not truly intend the will be legally effective, then perhaps the subset of wills that satisfy the formalities of holographic wills does not generate significant litigation regarding the possibility that the testator truly intended the will to be legally effective.

158. *See* Horton, *Wills Law*, *supra* note 4, at 1135 (explaining that "formality in the realm of holographs has a clear upside" in that "it distinguishes holographs from the great mass of typewritten, unattested, will-like writings" and suggesting that "[a]bandoning this convention would make it even harder to determine whether a decedent set out to make a will").

159. *See* Hirsch, *Testation*, *supra* note 136, at 292 ("As a matter of law, if the language of a formalized writing fails to convey unambiguously whether or not it is intended to comprise a will, all courts admit extrinsic evidence of the author's state of mind to resolve the question. But when the document on its face evinces testamentary intent, courts are divided. Some admit extrinsic evidence to rebut a presumption of intent created by the document, while others bar such evidence, relying on an external standard to judge intent.").

160. *See* John H. Langbein & Lawrence W. Waggoner, *Reformation of Wills on the Ground of Mistake: Change of Direction in American Law?*, 130 U. PENN. L. REV. 521, 541–42 (1982) ("Testamentary intent is ordinarily inferred without difficulty . . . . When, however, there is such an objection, the important point . . . is that most Anglo-American courts will consider the objection on the merits, even though the objection must rest entirely on extrinsic evidence contrary to the unambiguous language of the will.").

161. *See* Hirsch, *Testation*, *supra* note 136, at 296 ("[A]s common sense and the sparsity of cases suggest[,] most documents that look like wills are intended to be exactly what they seem."); Langbein & Waggoner, *supra* note 160, at 541 ("[T]here is seldom any objection that a [formal attested will] lacks testamentary intent.").

Whether holographic wills actually pose a greater risk of generating litigation is an open question.[162] Empirical studies comparing litigation rates in cases involving attested wills and those involving holographic wills are inconclusive regarding whether the issue of testamentary intent is costlier to decide for holographic wills. Some studies suggest that holographic wills are more prone to litigation than attested wills,[163] but others find that both types produce equivalent rates of litigation.[164] Nonetheless, despite this uncertainty, the potential for increased litigation rates is a primary concern that critics of holographic wills raise,[165] and it is perhaps one reason why a large minority of states do not authorize holographic wills.[166]

Within this context, the question is whether North Carolina's location requirement promotes the efficiency of the will authentication process. Like the signature and handwriting requirements, the location requirement directs the court to decide an objective issue. In particular, the court must determine where the will was located at the time of the testator's death. This issue potentially is more difficult to decide than the signature and handwriting requirements because it cannot be resolved simply by a review of the document itself. Evidence of the will's location must be considered, and any factual disputes must be resolved through litigation.[167] However,

162. *Compare* Clowney, *supra* note 4, at 52–53 ("[Holographic wills] rarely are contested in courtroom proceedings; in the overwhelming majority of cases, homemade testaments distribute a decedent's property without fuss or objection."), *with* Hirsch, *Formalizing*, *supra* note 134, at 827 ("And in the absence of a ritual will execution ceremony, much litigation has also revolved around whether an alleged holographic will was intended to be a final, legally operative document.").

163. *See* Horton, *Wills Law*, *supra* note 4, at 1134 ("Holographs do seem to spawn more than their fair share of litigation. Of the 332 wills under my microscope, 32 (10 percent) were handwritten. Yet of the thirty-five disputed testate matters, eight (23 percent) involved holographs."). Horton found that the primary issue of litigation regarding holographic wills was "whether these documents were meant to be wills" rather than simply "letters [or] diary entries," as "five of the six contested holographs turned on that issue." *Id*. *But see* Clowney, *supra* note 4, at 60 (reporting that a different "study . . . failed to uncover any evidence of unscrupulous potential heirs attempting to probate handwritten notes not intended as final testaments").

164. *See* Clowney, *supra* note 4, at 59–61 (reporting that "[o]f the 145 holographic documents submitted for probate in the years of study, only six (4%) resulted in a hearing or objection of any kind" and noting that "[r]ecent studies have found that between 2% and 10% of formal witnessed wills result in a courtroom tussle of some kind—findings abundantly similar to this study's analysis of holographs").

165. *See* Robey-Phillips, *supra* note 95, at 314 ("[O]pponents argue that holographs produce excessive litigation . . . ."); *see also* Brown, *supra* note 90, at 100 ("Holographic wills are notoriously prone to challenge.").

166. *See* Hirsch, *Inheritance and Inconsistency*, *supra* note 16, at 1072 n.42 (describing the drafting process of the Uniform Probate Code and the role that the potential for litigation played in the decision to authorize holographic wills).

167. Even though more signature and handwriting witnesses (three) are required than location witnesses (one), *see* N.C. GEN. STAT. § 28A-2A-9 (2017), the task of evaluating the signature and

the location of a will is an objective fact that generally presents little difficulty for the court.

In contrast to the signature and handwriting requirements, the location requirement also presents a subjective issue of intent. Indeed, beyond the factual question of where the testator stored the will, the location requirement raises thorny legal questions regarding such things as what constitutes "among the testator's valuable papers and effects"[168] and what constitutes a "safe place."[169] North Carolina courts interpret these phrases to refer to the subjective intent of the testator.[170] For instance, to determine whether a purported holographic will was found among the testator's valuable papers, the court must first determine what papers the testator considered to be valuable.[171] Litigation of this type is potentially burdensome because resolution of these issues is highly dependent on the particular facts and circumstances of the individual case. What is facially an objective issue (where the will was located at the time of the decedent's death) can quickly devolve into a subjective one (whether the decedent regarded the nearby papers or effects as valuable).

The Supreme Court of North Carolina affirmed that an analysis of whether a will was found among the testator's valuable papers focuses on the subjective intent of the testator, and it acknowledged the breadth of evidence that could bear on this issue when it explained:

> The phrase cannot have a fixed and unvarying meaning to be applied under all circumstances. It can only mean that the script must be found among such papers and effects as show that the deceased considered it a paper of value, one deliberately made and to be preserved, and intended to have effect as a will. This would depend greatly upon the condition, and business, and habits of the deceased in respect to keeping valuable papers, and the place and circumstances under which the script was executed . . . .[172]

handwriting boils down to inspecting the holograph itself and potentially comparing it to other writings. The location requirement, however, is a matter of evidence that cannot be resolved by inspecting the document. Rather, a dispute over the location of the document may amount to a credibility determination between the conflicting accounts of two opposing witnesses.

168. *See supra* Section I.B.1.

169. *See supra* Section I.B.2.

170. *See In re* Will of Lamparter, 126 N.C. App. 593, 602, 486 S.E.2d 458, 463 (1997) (Wynn, J., dissenting) ("Whether the place of discovery is 'among valuable papers or effects or in some other safe place' is a factual question, the issue being whether the deceased considered the papers valuable or the place a safe one."), *rev'd on other grounds*, 348 N.C. 45, 497 S.E.2d 692 (1998).

171. *See In re* Will of Allen, 148 N.C. App. 526, 533, 559 S.E.2d 556, 561 (2002) ("The determination of whether a will is found among valuable papers must be evaluated in the context of what would likely be regarded *by the decedent* as valuable.").

172. Winstead v. Bowman, 68 N.C. 170, 175–76 (1873).

As the court makes clear, the location requirement does not limit the court's analysis to a determination of an objectively verifiable fact.[173] Instead, the location requirement shifts a court's focus from one issue of subjective intent (i.e., whether the testator intended a will to be legally effective) to another issue of subjective intent (i.e., whether the testator considered the will's location to be among her valuable papers). By doing so, the location requirement raises additional issues that a court must consider in order to authenticate a holographic will, which, in turn, provides a greater opportunity for litigation. Indeed, the location requirement carries the potential to open exactly the types of inquiries—ones that require a court to look into the mind of the testator—that formalities are meant to minimize.

Thus, the location requirement does not further either of the two primary goals of will authentication. First, the requirement likely does not make the will authentication process more accurate. While the testator's compliance with the requirement certainly provides some evidence of testamentary intent, a testator's noncompliance with the requirement does not necessarily provide evidence of the absence of testamentary intent. Consequently, the requirement's effect of invalidating all holographic wills that are not found in one of the prescribed locations produces a significant risk of false negative outcomes.[174] Second, the requirement does not contribute to the efficiency of the will authentication process. Rather than minimizing litigation regarding the authenticity of holographic wills, the location requirement breeds litigation by providing an additional issue of subjective intent that must be decided.[175] As such, North Carolina's location requirement for holographic wills is inconsistent with both generally accepted objectives that policymakers should strive to achieve when crafting a method of will authentication.

III. LOCATION AND REVOKING HOLOGRAPHIC WILLS

Once a will is executed, it can be revoked.[176] Revocation generally is achieved (1) by the testator executing a subsequent will,[177] (2) by the testator defacing the will,[178] or (3) by operation of law based upon specific

173. *See id.*

174. *See supra* Section II.A.

175. *See supra* Section II.B.

176. *See* SITKOFF & DUKEMINIER, *supra* note 5, at 217.

177. N.C. GEN. STAT. § 31-5.1(1) (2017) ("By a subsequent written will or codicil or other revocatory writing executed in the manner provided herein for the execution of written wills . . . ."); *see also* SITKOFF & DUKEMINIER, *supra* note 5, at 218.

178. N.C. GEN. STAT. § 31-5.1(2) (2017) ("By being burnt, torn, canceled, obliterated, or destroyed, with the intent and for the purpose of revoking it, by the testator himself or by another

events that occur between the creation of the will and the testator's death.[179] The consequence of revocation by one of these methods is that a validly executed will loses its legal effectiveness in whole or in part.[180] As the Supreme Court of North Carolina has explained, "By revocation is meant the destruction of the operative force of the will . . . ."[181] Thus, a will obtains operative force only by its compliance with the will execution statute for either attested or holographic wills,[182] and it loses its operative force only through one of the methods prescribed by the will revocation statute.[183] Just as North Carolina's idiosyncratic location requirement for holographic wills raises policy concerns when examined in the context of will execution,[184] it also produces doctrinal conundrums when considered in this context of will revocation.

In most jurisdictions, revocation of holographic wills is straightforward—the testator creates a holographic will at some point during her life by signing a handwritten testamentary document and then subsequent acts or events revoke it at a later date. In North Carolina, however, revocation of holographic wills is not that simple. Indeed, because the location requirement prevents a signed and handwritten document from becoming a validly executed holographic will until it is found at the time of its author's demise,[185] North Carolina's holographic wills statute creates a doctrinal puzzle. If a will cannot be revoked until it is executed,[186] and a holograph cannot be fully executed until the death of the

person in the testator's presence and by the testator's direction."); *see also* SITKOFF & DUKEMINIER, *supra* note 5, at 217–18.

179. *See infra* notes 204–13 and accompanying text; *see also* SITKOFF & DUKEMINIER, *supra* note 5, at 238–40.

180. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. a (AM. LAW INST. 1999) ("A will that is revoked is inoperative . . . .").

181. *In re* Venable's Will, 127 N.C. 344, 346, 37 S.E. 465, 465 (1900).

182. N.C. GEN. STAT. § 31-3.1 (2017) ("No will is valid unless it complies with the requirements prescribed therefor by this Article.").

183. *Id.* § 31-5.7 ("No will can be revoked in whole or in part by any act of the testator or by a change in the testator's circumstances or condition except as provided by G.S. 31-5.1 through 31-5.6 inclusive.").

184. *See supra* Part II.

185. N.C. GEN. STAT. § 31-3.4(a)(3) (2017); McEwan v. Brown, 176 N.C. 249, 253, 97 S.E. 20, 21 (1918) ("But the finding of a holograph will among the valuable papers of the deceased, or competent evidence of its deposit in other hands for safe keeping, is as essential a part of the proof of execution as that the paper writing is in the handwriting of the alleged testator."); *In re* Will of Jenkins, 157 N.C. 429, 435, 72 S.E. 1072, 1074 (1911) ("The provisions of the [holographic wills] statute are, of course, mandatory and not directory, and therefore there must be a strict compliance with them before there can be a valid execution and probate of a holograph script as a will . . . .").

186. *See* RESTATEMENT (THIRD) OF PROP.: WILLS & OTHER DONATIVE TRANSFERS § 4.1 cmt. a (AM. LAW INST. 1999) ("From the time of execution, a will is inherently revocable . . . .").

testator (i.e., the one who may revoke it),[187] then, in a literal sense, a North Carolina holographic will cannot be revoked because no one is capable of doing so. This doctrinal conundrum arises when one examines each of the three ways in which wills are revoked.

A. Subsequent Writing

Consider the possibility that a testator attempts to revoke a holographic will by executing a subsequent attested will. In all jurisdictions except North Carolina, this scenario would produce little confusion because the sequence of events typically is clear. The handwritten will is validly executed when the testator signs it in Year 1, and it is revoked in Year 2, when the testator executes a valid attested will that expressly revokes all prior wills. When the testator dies in Year 3, the testator's estate is distributed according to the terms of her attested will, as it is undoubtedly the last will that the testator executed.

In North Carolina, however, the timeline is altered because the holographic will is not validly executed until it is found in one of the prescribed locations after the testator's death. Thus, the testator signs the handwritten document in Year 1, but it is not a validly executed holographic will because it has not yet satisfied the location requirement of the holographic wills statute. The testator then executes her attested will, which purports to revoke all prior wills, in Year 2. In Year 3, the testator dies, and her holograph is found in her safe-deposit box. Because the holograph was not executed until the testator's death in Year 3, the execution of the attested will in Year 2 could not revoke it. Therein lies the conundrum: because an unattested handwritten document is not validly executed until the testator's death, it would seem that a testator can never execute a subsequent will that revokes a holographic will. Moreover, because the holograph is technically the later-executed of the two wills, it is the holograph that would prevail to the extent it is inconsistent with the later-written-but-earlier-executed attested will.

B. Physical Act

Consider also the possibility that a testator attempts to revoke a holographic will by destroying it. Under this scenario, the testator signs a handwritten document in Year 1, burns, tears, or otherwise defaces the document in Year 2, and then dies in Year 3. In most states, the consequence of this sequence of events would be easy to assess. The testator executed a valid holographic will in Year 1, which remained in effect until the destructive act in Year 2. However, in North Carolina, the

187. N.C. GEN. STAT. § 31-3.4(a)(3).

same doctrinal conundrum that emerged in the context of revocation by subsequent writing surfaces in this context of revocation by physical act. If a handwritten document cannot be a validly executed will until the testator dies, no North Carolina testator ever has the opportunity to perform a revocatory act upon a holographic will.

The testator's apparent inability to revoke a holographic will, either by the execution of a subsequent will or by a destructive act, does not mean that the testator cannot prevent her estate from being distributed according to the terms of a signed and handwritten document. On a basic level, the location requirement itself provides the testator a mechanism to change her mind. If an author of an otherwise valid holograph moves it from her safe (an approved location) to her junk drawer (an unapproved location) and then dies while it is located there, then the document will not govern the distribution of her estate because it does not satisfy the location requirement of the holographic wills statute.[188] But while the testator's act of moving the handwritten document renders it ineffective, the move does not "revoke" the document as a will.[189] Rather, it prevents the document from becoming a validly executed will in the first place.

Additionally, even if a holograph is found in an authorized location after the testator's death, it will not necessarily govern the distribution of the testator's estate because North Carolina courts seem to have adopted an approach that sidesteps the doctrinal puzzle posed by the location requirement. Contrary to both the plain language of the statute and direct pronouncements by the Supreme Court of North Carolina,[190] both of which clearly state that a holographic will cannot be validly executed until after the testator's death, North Carolina courts sometimes refer to a holograph being executed at the time the testator signs it.[191] Although characterizing the execution of holographic wills in this way is analytically incorrect, it does resolve the doctrinal conundrum of the location requirement because the testator can now either execute a subsequent writing or perform a destructive act that revokes an "executed" holographic will.

188. *Id.*

189. *Id.* § 31-5.7 (identifying the exclusive methods of revocation); *see also In re* Will of Zollicoffer, 50 N.C. (5 Jones) 303, 305 (1858) (holding that once a will is made, it "could be revoked only in one of the modes prescribed in the statute").

190. *See supra* note 185 and accompanying text. It is unclear whether North Carolina courts intentionally adopted this approach to resolve the doctrinal puzzle or simply stumbled into it through inattention to the statutory language.

191. *See, e.g.*, Taylor v. Abernethy, 174 N.C. App. 93, 95, 620 S.E.2d 242, 245 (2005) (explaining that "[o]n 7 October 1997, [the testator] executed a holographic will" and that the testator "died on 18 January 1998"); Lahrmer v. Norris, 160 N.C. App. 595, 587 S.E.2d 682, 2003 WL 22289953, at *1 (2003) (unpublished table decision) (stating that "[o]n 23 June 2000, [testator] executed a holographic will" and that the testator "died on 30 July 2000").

Two cases illustrate how this solution to the puzzle works. The first is *In re Will of Venable*,[192] which involved a testator who drafted a holographic will in 1891 and executed an attested will shortly before his death in 1899.[193] The holographic will contained a provision that expressly revoked all prior wills and, although the attested will did not contain an express revocation clause, it did contain provisions that were inconsistent with provisions contained in the holographic will.[194] After the testator's death, the holographic will was found among his valuable papers,[195] and the court was tasked with deciding whether one or both of these wills should govern the distribution of the testator's estate.

If the court were to take the holographic wills statute at face value, then the court should have found that the holographic will was the testator's last and only will. Under this line of reasoning, the holographic will was not executed until it was found after the testator's death among his valuable papers, and therefore it became valid after the testator's execution of the attested will. Because the subsequently executed holographic will expressly revoked all prior wills, literal fidelity to the holographic wills statute would have resulted in the holographic will being the only document with legal effect to direct the distribution of the testator's estate.

The court, however, did not expressly consider this to be a possible outcome. Instead, the court focused on two other potential outcomes: either the attested will revoked the holographic will in whole, or it revoked the holographic will only to the extent that the terms of the two documents were inconsistent.[196] Both of these possible outcomes flowed from the court's characterization of the sequence of events, which it described in this way: "On August 29, 1891, Haywood Venable *executed* what purports to be his holograph[ic] will, found among his valuable papers after his death. On March 15, 1899, he executed another will a few days before his death . . . ."[197] In this passage, the court described the holographic will as being "executed" when it was written and signed.[198] By doing so, the court expressly separated the fact that the holograph was found in an authorized location from the event of its execution. By focusing on the time at which the testator authored the holograph rather than when it was found, the court made way for the conclusion that the testator executed the attested will subsequent to the execution of the holographic will.

192. 127 N.C. 344, 37 S.E. 465 (1900).
193. *Id.* at 345, 37 S.E. at 465.
194. *Id.* at 345–46, 37 S.E. at 465.
195. *Id.* at 345, 37 S.E. at 465.
196. *Id.*
197. *Id.* (emphasis added).
198. *Id.*

The second illustrative case is *In re Will of Wellborn*,[199] in which the court was tasked with determining the effectiveness of a holographic will that was found in an authorized location but with a tear running through the testator's signature.[200] Again, if the court were to take the location requirement at face value and hold that a holographic will is not validly executed until it is found after the testator's death, then the analysis of this scenario should not focus on revocation because a holographic will can never be executed at a time when the testator can perform a revocatory act upon it. Nevertheless, the court focused exclusively on the issue of revocation when it explained that, if the evidence of the will's condition were "accepted by the jury, it would . . . raise a presumption that the tear in question was done with intent to revoke the will."[201] Although the court did not expressly describe the holographic will as being executed at the time of the destructive act, its focus on revocation necessitates such a characterization because the testator's destructive act could constitute revocation only if the document was a validly executed holographic will at the time that he allegedly tore the signature page.

Through decisions like *In re Will of Venable* and *In re Will of Wellborn*, North Carolina courts have stretched the language of the holographic wills statute beyond its literal meaning. There is nothing in the case law to indicate that the North Carolina courts made this decision consciously. Thus, the result may be the product of inattentive oversight rather than the product of a reasoned approach to statutory interpretation. In any event, North Carolina courts need not adopt this approach. Indeed, North Carolina courts can honor both the language of the statute and the testator's intent that a holographic will not be legally effective. As explained previously, even if a purported holographic will satisfies the statutory requirements, a court must independently assess whether the testator intended the document to be her will.[202] Therefore, a purported holographic will should generally fail if the testator performed one of the acts that typically revokes a will because such conduct serves as strong evidence that the testator did not intend the document to be her will. Given the language of the holographic wills statute, a sounder resolution in a case like *In re Will of Wellborn* is simply to find that the purported holographic will fails for lack of evidence of testamentary intent.

Thus, a holograph found in an authorized location should generally fail for lack of testamentary intent if it was shown that the author burned, tore, or in some other way defaced the document. Likewise, if the testator

199. 165 N.C. 636, 81 S.E. 1023 (1914).
200. *Id.* at 637–38, 81 S.E. at 1023–24.
201. *Id.* at 639, 81 S.E. at 1024.
202. *See supra* notes 154–58 and accompanying text.

executes an attested will after writing and signing a holograph, the holograph generally should not be effective for the same reason. But again, the will's failure in these scenarios would not be a result of "revocation"—a will cannot be revoked until it is executed, and a North Carolina holographic will cannot be fully executed during the author's lifetime.[203] Instead, these acts suggest that the author withdrew her testamentary intent from the document prior to it becoming a holographic will, even if she possessed testamentary intent when the document was originally written. Thus, at the critical moment that the will could be validly executed—the moment of the author's death—such a document lacks sufficient indicia of testamentary intent.

C. Changed Circumstances

In contrast to revocation by destruction or subsequent writing, both of which involve an act by the testator that directly relates to the testator's will, revocation by operation of law occurs when certain events take place subsequent to the execution of a will.[204] For example, in North Carolina and most other domestic jurisdictions, the law revokes any gift to the testator's ex-spouse in a will that the testator executed prior to their divorce.[205] Similarly, marriage once revoked a premarital will in some states,[206] including North Carolina until 1967.[207] The modern law, however, addresses this problem differently, as a subsequent marriage does not revoke the testator's will completely.[208] Instead, the testator's surviving spouse is given a share of the testator's estate,[209] which, in essence, partially revokes other gifts in the will to the extent necessary to fund the spouse's gift. Finally, the birth of a child after the execution of a will is generally treated the same as marriage.[210] The arrival of subsequently born children does not revoke the testator's will outright, but such children are presumptively entitled to a share of the testator's estate,[211] which again effectively revokes gifts to other beneficiaries to the extent necessary to fund the children's gifts.

203. N.C. GEN. STAT. § 31-3.4(a)(3) (2017).

204. *See* SITKOFF & DUKEMINIER, *supra* note 5, at 238–39.

205. N.C. GEN. STAT. § 31-5.4 (2017); *see* SITKOFF & DUKEMINIER, *supra* note 5, at 239.

206. *See* SITKOFF & DUKEMINIER, *supra* note 5, at 240.

207. *In re* Will of Mitchell, 285 N.C. 77, 78, 203 S.E.2d 48, 49 (1974) ("Between 9 January 1845 and 1 October 1967 it was the law in North Carolina (with two exceptions not applicable to this case) that upon the marriage of any person his or her will was revoked.").

208. N.C. GEN. STAT. § 31-5.3 (2017).

209. *Id.*; *see* SITKOFF & DUKEMINIER, *supra* note 5, at 571.

210. *See* SITKOFF & DUKEMINIER, *supra* note 5, at 574–76 (providing the Uniform Probate Code's "Omitted Children" section, which allows unintentionally omitted children to receive the equivalent of their intestate share).

211. N.C. GEN. STAT. § 31-5.5 (2017).

The rationale of these rules is founded upon the testator's probable intent.[212] Because most people do not want their ex-spouses to benefit from their estates and most do want their surviving spouses and children to benefit, the law presumes that the testator's failure to update her will after divorce, marriage, or childbirth was the result of inattentiveness and not a conscious decision.[213] In these situations, the law views the events that occur after the execution of a will as providing strong evidence that the will no longer reflects the testator's actual intent.

While North Carolina recognizes this policy of adjusting the testator's will based upon her probable intent in light of events that occur after a will's execution, the state's location requirement arguably renders revocation by operation of law inapplicable to holographic wills. Because a holographic will does not exist until its author is dead, no lifetime events can occur subsequent to the will's execution—the testator will never divorce after the execution of a holographic will nor will other subsequent events occur that might trigger adjustments to the testator's will, such as marriage or birth of a child. As such, it would seem that a North Carolina holographic will can never be stale because it will always be executed after the occurrence of all of the testator's major life events, and consequently it would seem that revocation by operation of law is irrelevant to North Carolina holographs.

This conclusion, however, is not sensible. The same policy reasons for revocation by operation of law exist for holographic wills as for attested wills. If one testator writes a holographic will and places it in her safe-deposit box in Year 1 and leaves it untouched until she dies in Year 30, there is no reason to believe that the holographic will is any more up-to-date than the will of a testator who executes an attested will in Year 1 and leaves it untouched for the next thirty years. Indeed, just because a North Carolina holograph becomes fully executed at the time it is found does not mean that the testator thoroughly considered major life events after drafting and signing it. Thus, because both attested wills and holographic wills are susceptible to obsolescence after they are written, revocation by operation

212. *See* SITKOFF & DUKEMINIER, *supra* note 5, at 239.

213. *See* U.S. Bank, N.A. v. Rodriquez Garcia, 160 P.3d 679, 686 (Ariz. Ct. App. 2007) ("[R]evocation by divorce statutes rest on the belief that, after a divorce, neither spouse will usually wish to leave any part of his or her estate to the other . . . ."); UNIF. PROBATE CODE § 2-301 cmt. (UNIF. LAW COMM'N 2010) ("This section reflects the view that the intestate share of the spouse . . . is what the testator would want the spouse to have if he or she had thought about the relationship of his or her old will to the new situation."); Adam J. Hirsch, *Airbrushed Heirs: The Problem of Children Omitted from Wills*, 50 REAL PROP. TR. & EST. L.J. 175, 182–83 (2015) (explaining that the law assumes that testators "would regret not having acted more expeditiously to modify their estate plans" in reaction to "the subsequent appearance of a child").

of law for holographic wills should be measured from the time the will is written, not from the time the will is found.

Perhaps recognizing that the same policies should apply both to attested and holographic wills, North Carolina courts again have (consciously or not) stretched the language of the holographic wills statute in order reach desired outcomes. Just as they do in the context of revocation by subsequent writing and physical act, North Carolina courts refer to holographic wills being executed during the testator's lifetime without also considering that the will execution statute makes the discovery of the will after the testator's death part of the will execution process. This reading of the statute allows events, such as divorces, marriages, and births, to occur after the execution of a holographic will and consequently renders revocation by operation of law applicable to holographs.

Consider, for example, *Wachovia Bank & Trust Co. v. McKee*.[214] In this case, the testator drafted a holographic will that gave his entire estate to his wife.[215] The couple subsequently had two children, one of whom was born mere days after the testator drafted the will and one who was born a few years later.[216] After their father's death, the two children argued that they should be entitled to a portion of their father's estate because they were unintentionally omitted from the will that their father prepared prior to their births.[217] The relevant North Carolina statute provided that "after-born" children were presumptively entitled to a share of the parent's estate,[218] and it defined "after-born" as "born . . . subsequent to the execution of the will."[219]

Because the holographic will was not fully executed until it was found after the testator's death, it would seem that the children in this case, and indeed any children omitted from a holographic will, should not be considered "after-born" as defined by the statute. Nonetheless, the court used the now-familiar tactic of describing the holographic will as being executed at the time it was signed rather than when it was discovered after the testator's death.[220] By reframing the sequence of events in this way, the court brought children who are omitted from holographic wills within the definition of "after-born."

214. 260 N.C. 416, 132 S.E.2d 762 (1963).

215. *Id.* at 418, 132 S.E.2d at 764.

216. *Id.*

217. *Id.* at 417, 132 S.E.2d at 763.

218. N.C. GEN. STAT. § 31-5.5(a) (2017).

219. *Id.* § 31-5.5(c); *see also McKee*, 260 N.C. at 418, 132 S.E.2d at 764 ("In simple terms, a child born after the will is executed takes as in case of intestacy . . . .").

220. *See McKee*, 260 N.C. at 418, 132 S.E.2d at 764 ("Ernest Lyndon McKee executed his will on January 28, 1949. He died on April 9, 1961.").

Finally, consider *Sawyer's Legatees v. Sawyer's Heirs*,[221] which analyzed the application of the revocation-upon-marriage statute that was in effect in North Carolina until the middle of the twentieth century.[222] In this case, the testator drafted a holographic will the year prior to marrying his surviving wife.[223] After the testator's death, the court was faced with the issue of whether the testator's subsequent marriage revoked the will. Like the issue of subsequently born children, the issue of subsequent marriage seems to be irrelevant to holographic wills under North Carolina law. Because the location requirement prevents a holographic will from being fully executed until the testator's death, the testator's marriage did not occur after the execution of his holographic will and consequently the revocation by operation-of-law statute should be inapplicable.

The court, however, once again characterized the sequence of events in a way contrary to what the holographic wills statute would seem to dictate.[224] For instance, while advocating for the effectiveness of the testator's will, the lawyer for the will's proponents argued that "the will had not been revoked" by the testator's marriage because "although it was found among the valuable papers, . . . it was [not necessarily] there before the marriage; ergo, it was not then a will" and therefore "could not then be revoked."[225] Noticeably, the lawyer did not argue that a holograph is not a will until it is found. Rather, his argument was that a holograph is not a will until the testator places it in an authorized location.

The court summarily rejected this argument by again focusing attention on the moment that the testator signed the holograph. It explained:

> The fallacy of the argument is in this: the paper, being found among his valuable papers, the law makes the inference that it was put there by the testator, and carries the inference back to the time of its date, in the absence of any proof to the contrary; [the will is therefore] presumed to have been executed at the time of its date . . . .[226]

By presuming the holographic will to be executed at the time the testator signed it, rather than when it was discovered, the court once again reached the sensible outcome that the location requirement should not prevent the application of revocation rules to holographic wills. However, it also once again ignored the plain language of the holographic wills statute to do so. Thus, as this case illustrates, not only does North Carolina's location

221. 52 N.C. (7 Jones) 103 (1859).
222. *Id.* at 105.
223. *Id.* at 104.
224. *See id.* at 105–08.
225. *Id.* at 108.
226. *Id.*

requirement for holographic wills rest upon questionable policy foundations when considered in the context of will execution,[227] but it also produces complicated doctrinal puzzles that courts must solve through creative means in order to ensure that will revocation rules apply to holographic wills.

IV. REFORM AND THE LOCATION OF WILLS

In light of the problems associated with North Carolina's location requirement for holographic wills, change is necessary. First, the North Carolina General Assembly should amend the holographic wills statute so that the making of a holographic will no longer depends on where it is found after the testator's death. Second, North Carolina courts should consider the location in which a holographic will was stored as evidence of testamentary intent (or lack thereof). In short, a holographic will's location should be downgraded from its current status as a mandatory element to its rightful status as a relevant consideration.

A. Abolishing the Location Requirement

Simply put, the location requirement in the North Carolina holographic wills statute should be repealed. As a will execution formality, it fails to achieve its intended purposes.[228] The location requirement adds to neither the accuracy nor the efficiency of the will authentication process. If anything, it undermines both the accuracy and the efficiency of probate courts.[229] As an additional detriment, it creates unnecessary doctrinal puzzles in the will revocation process.[230] To avoid the absurd result of irrevocable holographic wills, North Carolina courts have been forced—intentionally or not—to depart from the actual language of the holographic wills statute.[231] Removing the location requirement from the holographic wills statute would solve both problems—it would better accord with the policy goals underlying will execution formalities and result in a doctrinally tidy avenue to revoke unwanted holographic wills.

Removing the location requirement would also bring North Carolina in line with every other jurisdiction in the country that recognizes holographic wills. Uniformity is important in decedents' estates,[232] and

227. *See supra* Part II.

228. *See supra* Part II.

229. *See supra* Part II.

230. *See supra* Part III.

231. *See supra* Part III.

232. *See* SITKOFF & DUKEMINIER, *supra* note 5, at 68 (noting the Uniform Law Commission's "profound influence on the development of the law of wills, trusts, and estates"); *see also* Thomas P. Gallanis, *Trusts and Estates: Teaching Uniform Law*, 58 ST. LOUIS U. L.J.

perhaps nowhere more so than when it comes to homemade wills. In 1941, the Tennessee legislature came to the same realization when it abolished the only other location requirement in a domestic holographic wills statute.[233] In the interim almost eighty years, exactly zero state legislatures outside of North Carolina have thought it wise to impose a location requirement on holographic wills.[234] The North Carolina General Assembly should learn from that collective wisdom and deem the location requirement of the holographic wills statute a failed experiment.

B. Considering Location as Evidence of Intent

If the North Carolina General Assembly repeals the location requirement from the state's holographic wills statute, the location of a purported holographic will at the time of the testator's death should not become irrelevant to the document's validity. Rather than being a mandatory prerequisite for the validity of a holographic will, the document's location should be one of the slew of potential considerations that evince testamentary intent.[235] As explained previously, even if a document complies with the handwriting and signature requirements for holographic wills, the probate court must independently assess whether the testator intended the document to be a valid will.[236] Within this context, a will's location may or may not inform the court whether the testator possessed testamentary intent.[237] Using location as a factor in determining testamentary intent would be consistent with how courts of other states view the relevancy of a purported will's location.

671, 673 (2014) (noting that the Uniform Law Commission is "particularly [active] in the field of trusts and estates").

233. *See In re* Will of Gilkey, 256 N.C. 415, 420, 124 S.E.2d 155, 158 (1962).

234. The few academic commentators who have considered the issue tend to agree. *See* Natale, *supra* note 15, at 200 ("[G]iven the courts' policy of liberally construing testamentary intent in holographic wills, the 'valuable papers or effects' requirement seems unnecessary and potentially troublesome."); Robey-Phillips, *supra* note 95, at 331 ("[A] valuable-papers *requirement* seems misguided."). *But see* Williams, *supra* note 128, at 427 ("As an additional safeguard, proof should be required either that the will was deposited with a disinterested third party by the testator, to be produced as his will after his death, or that it was found among the decedent's valuable papers, or in some other place indicating its deposit there by him with final testamentary intent.").

235. *See* Natale, *supra* note 15, at 200 ("In general, if the 'valuable papers or effects' requirement were abolished, the place of deposit would still be relevant—rather than being an essential statutory formality, the place of deposit would constitute circumstantial evidence bearing on the question of testamentary intent.").

236. *See supra* notes 154–58 and accompanying text.

237. *See* Adam J. Hirsch, *Text and Time: A Theory of Testamentary Obsolescence*, 86 WASH. U. L. REV. 609, 645–46 (2009) ("From the existing cases we can distill a number of recurring themes that hold promise as badges of probable intent. [Such badges include whether the will was] discovered among the testator's important papers, or among worthless papers.").

Although no other state requires that a holographic will be stored in a particular location, many have a body of case law that illustrates how a document's location evidences testamentary intent. The richest case law in this area tends to come out of Tennessee, which previously had a statute that, like the current North Carolina statute, required holographic wills to be kept in certain enumerated locations.[238] Thus, Tennessee courts were trained to analyze the location of holographic wills as a necessary component of their validity. In the decades following the statute's repeal in 1941, however, Tennessee courts tended to expressly use a holographic document's location as a non-determinative factor when analyzing whether the document was made with the necessary testamentary intent. As one Tennessee appellate court explained:

> [T]he present statute dispenses with the requirement that the propounded instrument must have been found among the valuable papers of the decedent or lodged in the hands of another for safe-keeping; but under the general rules of evidence, the place where the propounded paper was kept by the writer and found after his death, is still a circumstance of no little probative value to be considered along with all of the other facts and circumstances upon the question of whether he intended it to operate as a will. In short, the effect of the statutory provision was to reduce the place of deposit from an essential factor to an evidential circumstance relevant to the animus testandi.[239]

Under this approach, storing a holographic document haphazardly with worthless papers tends to weigh against testamentary intent in Tennessee.[240] However, a holographic will need not be kept with a decedent's other testamentary documents, or even along with any valuable papers at all, as long as there is other sufficient evidence of testamentary intent.[241]

Other state courts have also implicitly or expressly employed the location or manner of a document's storage as a component of determining whether a facially ambiguous holograph was written with testamentary

238. *See supra* note 18.

239. Smith v. Smith, 232 S.W.2d 338, 342 (Tenn. Ct. App. 1949).

240. Davidson v. Gilreath, 273 S.W.2d 717, 722 (Tenn. Ct. App. 1954) (finding that holographic document found in decedent's "junk room" was "junk" rather than a document infused with testamentary intent); *see also Smith*, 232 S.W.2d at 340, 343–44 (affirming jury's finding that holographic document was not a will based in part on the manner in which it was kept on a pad of paper in a drawer along with unimportant papers rather than in the decedent's safe with his valuable papers).

241. *See* Northcross v. Taylor, 197 S.W.2d 9, 13 (Tenn. Ct. App. 1946) (finding that a holographic document stored in a box by the decedent's bedside was a valid second codicil to decedent's will even though the will and first codicil were stored elsewhere).

intent. For example, in one Utah case, a holographic document was discovered that contained a sentence that purported to revoke a prior attested will, but it also contained other unrelated notes and "a list of random comments and reminders."[242] Although the language of the revocatory sentence was clear, the character of the documentary as a whole was found to be ambiguous regarding the author's testamentary intent.[243] The decedent had carefully stored the holographic document along with the allegedly voided prior will in a document holder in a metal box locked inside a metal cabinet.[244] The trial court found the manner and location in which the holographic document was stored to be "dispositive" regarding its nature as a true testamentary document.[245] The appellate court affirmed, stating that the care with which the holograph was kept was "typical of someone who is dealing with a document regarded as important; such lengths are not ordinarily undertaken to preserve a mere list of things to do."[246]

As this case from Utah suggests, the case law in states other than North Carolina generally treats a testator's storage of a purported holographic will along with other valuable papers as an indication that she regarded it as important and thus supportive of testamentary intent.[247] Likewise, a testator's act of lodging a purported holographic will with a third party for the purpose of safekeeping is typically considered evidence of testamentary intent.[248] Simply preserving a document at all may demonstrate some testamentary intent,[249] but distributing copies to others

242. Bass v. Englesath (*In re* Estate of Custick), 842 P.2d 934, 935–36 (Utah Ct. App. 1992).

243. *Id.* at 936.

244. *Id.* at 935.

245. *Id.* at 937.

246. *Id.* at 936 n.3.

247. *See also In re* Estate of McKean, 48 A.2d 74, 75 (Pa. Super. Ct. 1946) (finding that a holographic document was testamentary when, among other things, it was "placed for safekeeping with the formal will"); Guar. Nat'l Bank v. Morris, 342 S.E.2d 194, 196–97 (W. Va. 1986) (noting that a holographic document was found in the decedent's bedroom "in the place where she kept her tax and other important papers" and concluding that "the extrinsic evidence indicates that the testatrix intended to make a will").

248. *See* Monaco v. Peterson (*In re* Estate of Wolfe), 67 Cal. Rptr. 297, 301 (Cal. Ct. App. 1968) (noting that the testator, by "sending the letter by registered mail and admonishing [the recipient] relative to its safekeeping . . . indicated his awareness of the letter's importance and character"); *see also* Scott v. Atkins, 314 S.W.2d 52, 73 (Tenn. Ct. App. 1957) (entrusting holographic will to husband for safekeeping deemed reasonable).

249. In one California case, a serviceman wrote a brief holographic will on the fly leaf of a prayer book while serving overseas in 1944. Smith v. Musser (*In re* Estate of Stephenson), 45 Cal. Rptr. 121, 122 (Cal Ct. App. 1965). The document requested that, "[i]f necessary," the serviceman's "Good Book and all possessions" be returned to his aunt in California. *Id.* The serviceman went on to live until 1961, at which time the prayer book containing the holographic document was found in a wooden box at the foot of his bed. *Id.* The trial court found that the holograph only directed the disposition of the meager possessions that the decedent owned when

with no instructions regarding the testamentary nature of the document generally weighs against finding that the author truly regarded the document as one that disposed of property.[250]

Although a will's location is relevant to the issue of testamentary intent, it should not be determinative,[251] as a holographic document's location is but one of many potential considerations bearing on testamentary intent.[252] For example, one Texas case featured two purported wills: an 1895 holograph that was found in the decedent's trunk with his valuables and a 1904 holograph that was found in the decedent's "residence, in the room where he died, located on a table and under or among a lot of old letters, circulars, medical journals, and other papers of no value."[253] In upholding the validity of the 1904 holograph, the court noted that it "was found in possession of the deceased, it was wholly written by him, and two disinterested witnesses testified that he told them that he had willed all of his property to [the beneficiary named in the 1904 holograph]."[254] Thus, the appellate court found that the 1904 holograph should have been probated as the decedent's last will despite the fact that it was stored in a less secure location than the earlier 1895 holograph.[255]

The much more recent *State v. Palm (In re Estate of Melton)*[256] case from Nevada featured similar facts and the same result. The *Palm* decedent executed a formal will in 1975 that devised his estate to various relatives and disinherited his daughter.[257] In 1979, the decedent handwrote a codicil

it was written in 1944 and that the remainder of the decedent's wealth should be distributed according to the state's intestacy statute. *Id.* The appellate court reversed that finding and instead found that the decedent intended for the entirety of his estate to be distributed to the aunt named in the holograph; this finding was based in part on the decedent's "preservation of his holographic will in his bedroom." *Id.* at 123.

250. *See In re* Will of Dehn, 347 N.Y.S.2d 821, 829 (N.Y. Sur. Ct. 1973) (finding "[f]rom the decedent's actions, correspondence and conversations concerning the six instruments which, after his death, were found to be floating about Europe and the U.S.A., it is the conclusion of this court that the decedent did not so intend" any of the documents to be his last will).

251. One scholar has argued that, while a purported holographic will's location should not be determinative, it should trigger rebuttable presumptions regarding testamentary intent. *See* Robey-Phillips, *supra* note 95, at 331 ("If the document is discovered among the decedent's important papers . . . and meets both the handwriting and signature formalities, a presumption of validity should arise. However, the presumption should not arise if the document is discovered simply among the decedent's everyday belongings, because that would not distinguish a potential draft from a completed will.").

252. *See, e.g.*, Brown v. Kelly, 351 P.2d 548, 550 (Mont. 1960) (considering the date and location of decedent's handwriting on the back of the alleged holographic will in evaluating testamentary intent).

253. Ainsworth v. Briggs, 108 S.W. 753, 754 (Tex. Civ. App. 1908).

254. *Id.* at 755.

255. *See id.* at 756.

256. 272 P.3d 668 (Nev. 2012) (per curiam).

257. *Id.* at 671.

on the back of his formal will that left a small portion of his estate to a friend named Alberta Kelleher.[258] In 1995, following the death of the decedent's mother, the decedent wrote Kelleher a holographic letter, in which he stated that he wanted Kelleher to inherit his entire estate, and that he did not want any of his relatives to inherit anything.[259] Kelleher predeceased the decedent by six years.[260] Upon the decedent's death in 2008, a dispute arose regarding whether the decedent's estate should escheat to the state based on the disinheritance of all of his relatives in the 1995 letter or whether it should be distributed according to the 1975 formal will.[261]

The decedent's 1975 will was found in his safe-deposit box, and the 1995 letter was found among his miscellaneous papers.[262] The opponents of the 1995 letter argued that its location demonstrated the decedent's lack of intent for the 1995 letter to control the distribution of his estate.[263] The Supreme Court of Nevada disagreed, finding that "[a]lthough [the decedent] did not store the 1995 letter in the same manner that he stored the 1975 will, its validity as a holographic will does not depend on him doing so."[264] The court found independent indicia of testamentary intent in the language used in the letter.[265] Ultimately, the court found that the 1995 letter revoked the 1975 formal will and validly disinherited all of the decedent's relatives; thus, the decedent's sizable estate escheated to the state.[266]

Should the North Carolina General Assembly abolish the location requirement from the holographic wills statute, North Carolina courts would do well to follow the lead of other state courts that consider a holograph's place of storage as evidence of testamentary intent. Where a document is stored undeniably sheds light on how its author regarded it. Therefore, while a holographic will's location should not be mandatory to its validity, neither should it be irrelevant.

258. *Id.*
259. *Id.* at 671–72.
260. *Id.* at 672.
261. *Id.* at 672–73. Escheat is the process by which a decedent's property is transferred to the state in the absence of a will or legal heirs. *See* John V. Orth, *Escheat: Is the State the Last Heir?*, 13 GREEN BAG 2D 73, 73–74 (2009).
262. *Palm*, 272 P.3d at 672, 674.
263. *Id.* at 674.
264. *Id.*
265. *Id.*
266. *Id.* at 680–81.

CONCLUSION

Requiring holographic wills to be found in certain approved locations at the time of the testator's death is unsound policy. It makes the work of probate courts less efficient and no more accurate. It creates perplexing conundrums when evaluating whether and how holographic documents may be revoked. It produces no countervailing benefits to offset these drawbacks, and there is nothing peculiar about North Carolina testators to justify the Tar Heel State's outlier approach to holographic wills.

The North Carolina General Assembly should therefore repeal the location requirement from the holographic wills statute. A holographic will's location should no longer be regarded as a mandatory requirement. Rather, it should be relegated to the status of just one of the numerous indicia of testamentary intent. This approach has worked well for numerous other states. The path is blazed. North Carolina legislators and courts simply need to pick up the torch and follow the reasoned footsteps on the trail.